ORIGINAL

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No. 92-8830

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

JIMMIE BURDEN, Jr.,

Petitioner,

v.

WALTER ZANT, Warden, Georgia
Diagnostic & Classification Center,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. This case was remanded by this Court "so that the Court of Appeals may consider petitioner's conflict-of-interest claim free from its erroneous failure to credit the state trial court's finding that [the state's key witness] testified under a grant of immunity." Burden v. Zant, 111 S. Ct. 862, 865 (1991) (per curiam).

   Did the court of appeals violate the law of the case and exceed the scope of this Court's mandate by rejecting that state-court finding?

2. Petitioner claimed below that he was denied the conflict-free assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments because petitioner's attorney simultaneously represented petitioner and the state's key witness against petitioner and negotiated an immunity agreement on behalf of the witness in exchange for the witness's testimony against petitioner.

   For purposes of evaluating this claim, does the court of appeals' requirement that the immunity agreement be memorialized in writing conflict with this Court's decisions in Cuyler v. Sullivan, 446 U.S. 335 (1979), and Holloway v. Arkansas, 435 U.S. 475 (1978)?

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JIMMIE BURDEN, Jr.,

Petitioner,

v.

WALTER ZANT, Warden, Georgia
Diagnostic & Classification Center,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Jimmie Burden, Jr., an inmate under a sentence of death in the state of Georgia, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on October 5, 1992. Rehearing and rehearing en banc were denied on January 19, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit on remand from this Court is reported at 975 F.2d 771 (11th Cir. 1992). The per curiam opinion of this Court remanding the case to the Eleventh Circuit is reported at 111 S. Ct. 862 (1991) (per curiam). The Eleventh Circuit's

first opinion is reported at 903 F.2d 1352 (11th Cir. 1990). The opinion of the United States District Court for the Middle District of Georgia (Owens, Ch.J.) is reported at 690 F. Supp. 1040 (M.D. Ga. 1988), and the Eleventh Circuit's opinion remanding to the district court for an evidentiary hearing is reported at 871 F.2d 956 (11th Cir. 1989). Each of these opinions is reprinted in the appendix. The district court's unreported order issued after the evidentiary hearing, No. 88-6-3-MAC (M.D. Ga. Sept 20, 1989), is also reprinted in the appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the . . . right to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> [N]or cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1, cl. 2.

STATEMENT OF THE CASE

A majority of the Court of Appeals ignored this Court's clear mandate that the state court finding of fact,

recognizing that the state's main witness testified under a grant of immunity, must be afforded the presumption of corrections in 28 U.S.C. § 2254(d). As a consequence of its rejection of this Court's authority, the panel failed to fairly consider his claim that he was convicted and sentenced to death in violation of his constitutional right to conflict free counsel. The factual basis for this claim is straight forward: Burden's counsel simultaneously represented both Burden and Burden's nephew, "Acid" Henry Lee Dixon. During this period, Burden's attorney negotiated immunity for Dixon in exchange for Dixon's testimony against Burden. At Burden's trial, Dixon provided the only evidence linking Burden to the crime. Based on these uncontroverted and uncontrovertible facts, petitioner has consistently maintained that he was denied his Sixth Amendment right to the conflict-free assistance of counsel.

In 1974, four bodies were recovered from a pond located in a sparsely-populated county in rural Georgia. A massive investigation followed, but the crimes went unsolved. See, e.g., Burden v. State, 297 S.E.2d 242, 243 (Ga. 1982), cert. denied, 460 U.S. 1103 (1983). At no point throughout this unprecedented investigation did Burden's name surface as a potential suspect. Some six years later, Burden was indicted for an unrelated burglary. Public defender Kenneth Kondritzer was appointed to represent Burden on the burglary charge. One month later, the police, acting on an anonymous informer's

tip, arrested "Acid" Dixon in connection with the 1974 murders. Kondritzer, while still representing Burden, was also appointed to represent Dixon. Dixon implicated Burden in the murders, and criminal warrants charging both Burden and Dixon with the murders were issued. At that point, therefore, it is undisputed that Kondritzer was simultaneously representing both Dixon and Burden on the murder charges.

A committal hearing was held to determine if there was probable cause to hold Dixon on the murder charges. At the hearing, the trial court found there was insufficient evidence to bind Dixon over.[1/] The court, however, ordered that Dixon be detained in jail as a material witness. Dixon's counsel at the hearing was Kondritzer. Indeed, it was Kondritzer who successfully argued that there was no probable cause to hold Dixon. Kondritzer continued to represent Dixon during the period of Dixon's detention, all the while also representing Burden. While he represented Dixon, Kondritzer reached an "understanding" with the district attorney that Dixon would not be prosecuted for the murders if--and only if--he agreed to testify against Burden. As would soon become obvious, Kondritzer's conflict sealed Burden's fate.

Kondritzer left the public defender's office in December, 1981 before Burden went to trial. The county's other public defender, Michael Moses, then assumed responsibility for

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[1/]Dixon could, of course, have been directly indicted if probable cause later developed. See, e.g., Boyce v. State, 362 S.E.2d 229, 231 (Ga. 1987).

representing Burden.[2] Inheriting the conflict created by Kondritzer, Moses could not and did not provide Burden with constitutionally adequate representation. The damage had already been done. Moses, bound to honor the agreement secured by his predecessor, could not and did not seek a similar agreement for Burden. At Burden's trial, Dixon testified and "provided the sole evidence linking [Burden] to the murders." Burden v. Zant, 111 S. Ct. 862, 863 (1991) (per curiam) (citation omitted). With no physical evidence linking Burden to the crime, the impact of Dixon's testimony cannot be underestimated. Id. at 863 n.2 ("Dixon was '[t]he witness most damaging to [Burden's] case.'") (quoting state court post-trial report).

At trial, Dixon testified that he had been granted immunity in exchange for his testimony. In his closing argument, the prosecutor confirmed that he had offered Dixon immunity. From this record, the state trial judge found in its mandatory post-trial report that "Dixon was testifying under a grant of immunity." Id. at 863; see also id. at 864 (state trial court's report expressly found that "'Dixon was granted immunity from prosecution.'"). Kondritzer later confirmed his role in negotiating that immunity, testifying at the federal evidentiary hearing that, while Dixon was being

[2]Prior to Kondritzer's leaving the public defender's office, he and Moses worked together many most cases, and generally shared the public defender responsibilities. Kondritzer was the senior lawyer, and Moses worked as his subordinate.

detained as a material witness, Kondritzer "reached 'an understanding' with the district attorney that 'as long as [Dixon] testified [against Burden] nothing would happen to [Dixon].'" Id. at 864 (citing No. 88-6-3-MAC, slip op. at 4 (M.D. Ga. Sept 20, 1989)) (district court findings of fact made after evidentiary hearing).

Six years after the bodies were recovered from the pond, Burden was convicted and sentenced to death on the strength of Acid Dixon's testimony. When the jury returned its verdict of guilty, Dixon received the benefit of his bargain and walked out of the courtroom a free man. Through it all, Jimmie Burden never knew that the critical testimony against him had been procured by his own counsel. An illiterate man slow to understanding, Burden was utterly dependent on the good faith and integrity of his counsel. Yet at no point was Burden told of the conflict and provided with an opportunity to protest against it.

Burden's conviction was affirmed on direct appeal. Burden v. State, 297 S.E.2d 242 (Ga. 1982), cert. denied, 460 U.S. 1103 (1983). After exhausting his state-court remedies, Burden petitioned for a writ of habeas corpus, alleging inter alia that he had been denied the effective assistance of counsel because Kondritzer labored under a conflict of interest. The district court denied relief. 690 F. Supp. 1040 (M.D. Ga. 1988). Retaining jurisdiction, the court of appeals remanded the case for an evidentiary hearing to

develop the facts surrounding the conflict claim. 871 F.2d 956, 957 (11th Cir. 1989).[1/] After the hearing, the case returned to the court of appeals, which affirmed the district court's denial of habeas relief. 903 F.2d 1352 (11th Cir. 1990). In rejecting Burden's conflict claim, the court of appeals observed that "the assumption that Dixon received a grant of transactional immunity, negotiated by Kondritzer and the prosecutor in exchange for Dixon's testimony against [Burden] is without factual support." Id. at 1359.

In a unanimous per curiam opinion, this Court reversed. ___ U.S. ___, 111 S. Ct. 862 (1991) (per curiam). The Court held that the lower court had failed to accord the state-court finding that "Dixon was granted immunity from prosecution" the presumption of correctness to which it was entitled under 28 U.S.C. § 2254(d). Accordingly, the Court remanded the case for the simple and express purpose of enabling the court of appeals to "consider [Burden's] conflict-of-interest claim free from its erroneous failure to credit the state trial court's finding that Dixon testified under a grant of immunity." Id. at 865.

Rather than abide by this Court's instructions, the court below again summarily rejected the state court's finding that Dixon testified under a grant of immunity. Moreover, having

[1/]The court of appeals' opinion remanding for an evidentiary hearing was authored by Judge Vance. Because of Judge Vance's unexpected death, however, he did not participate in the court's first opinion, 903 F.2d 1352 (11th Cir. 1990), which was decided by a two-judge quorum.

rejected this finding, the court then erroneously concluded that Burden's right to the conflict-free assistance of counsel had not been violated because Kondritzer never negotiated a formal grant of transactional immunity, as distinct from negotiating an informal grant of immunity. As explained below, this distinction is irrelevant for purposes of analyzing petitioner's claim under the Sixth Amendment.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals on remand from this Court: (a) exceeded the scope of this Court's mandate in Burden v. Zant, 111 S. Ct. 862 (1991) (per curiam); and, (b) conflicts with this Court's decisions in Cuyler v. Sullivan, 446 U.S. 335 (1980), and Holloway v. Arkansas, 435 U.S. 475 (1978).

A.

The mandate of this Court on remand was clear and specific: the Court remanded the case to allow the court of appeals to "consider [Burden's] conflict-of-interest claim free from its erroneous failure to credit the state trial court's finding that Dixon testified under a grant of immunity." 111 S. Ct. at 865. This instruction could not be more direct. The Court's mandate instructed the court of appeals to accept the state court's finding that Dixon "testified under a grant of immunity" and to evaluate the constitutional consequences of that fact. Nothing more.

Over a strong dissent, a majority of the panel below rejected this Court's instructions and held that the state court's finding was not entitled to a presumption of

correctness. In no uncertain terms, the majority said that the "state trial court's statements in the post-conviction report are not factual findings." 975 F.2d at 772 n.1. Rather, they were merely "personal impressions." Id. This facile effort to discount the status of the state court's finding is impossible to square with this Court's unanimous conclusion, made after full review of the record and pleadings, that the state court's finding of Dixon's immunity was "a determination of historical fact 'presumed to be correct' for purposes of federal habeas corpus proceedings." 111 S. Ct. at 864. The entire point of this Court's remand was to allow the court below to evaluate the legal consequences of this "historical fact." This Court does not and should not hesitate to enforce compliance with the plain language of its mandates. See, e.g., Yates v. Aiken, 484 U.S. 211, 214 (1988) (granting certiorari because lower court "had not fully complied with [the Court's] mandate"); see also Yates v. Evatt, 111 S. Ct. 1884, 1890 (1991); Powell v. Texas, ____ U.S. ____, 109 S.Ct. 3146 (1989) (per curiam)

The panel majority dismissed the state court's factual finding based on its view that the finding was not "adequately developed" in the state court, and was therefore not entitled to the presumption of correctness. 975 F.2d at 772 (citing 28 U.S.C. 2254(d)(3)). Again, the court below did not read this Court's opinion with sufficient care. As this Court recognized, the state-court finding was "made pursuant to

statutory directive and based on Dixon's testimony and the prosecutor's closing argument at trial." 111 S. Ct. at 864 (citations omitted).

Dixon's testimony--to which the Court referred and in which Dixon said he was granted immunity--was made at Burden's trial, where it could be and was developed through the adversarial process. In addition, the prosecutor's closing argument--to which the Court referred and in which the prosecutor admitted that Dixon had been granted immunity--was surely a source upon which the state court could base its finding.[4/] In short, the state-court's factual finding was based on testimony and argument presented and developed at a criminal trial. The court below nonetheless reached the bewildering conclusion that this finding was "not the product of an adversary proceeding before the court." 975 F.2d at 772.

To permit the court below to redetermine whether the state-court factual finding was "adequately developed"-- after that issue has already been determined by this Court--would violate well-established principles of law. In the first instance, the action of the court below contravenes the law of the case established by this Court. Having already been

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[4/]District Attorney Malone said at his closing: "[W]e may have offered [Dixon] immunity. I think you realize that we did. I'll tell you that we did." 111 S.Ct. at 863 n.1 (emphasis added).

decided in this Court, the issue should not have been reopened by the court below. See, e.g., United States v. United States Smelting Co., 339 U.S. 186, 198 (1950) ("The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter.") (citations omitted); see also Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16 (1988).

More importantly, the action of the court below violates this Court's mandate. Unlike the law of the case, the mandate rule is not grounded only in policy considerations; rather, it is a rule limiting the authority of the court to which the mandate is issued. See, e.g., 1B James W. Moore, Moore's Federal Practice ¶ 0.404[10], at 173-74 (2d ed. supp. 1992) ("[T]he mandate rule is broader than the law of the case; the [lower court] may no more exceed the directions of the mandate by retrying facts or altering its findings than by disregarding the law as decided by the [higher court]."). Here, the court below rejected the state-court finding on the mistaken promise that this finding was not "adequately developed." Yet the court below had no authority to reject the state-court finding. That option was foreclosed by the directions of this Court's mandate.

Besides overstepping this Court's mandate and ignoring the law of the case, the panel majority's conclusion was clearly erroneous. As noted above, this Court provided

several reasons why the state court finding was more than adequately developed: (1) The finding was contained in a written post-trial report prepared in a capital case. 111 S. Ct. at 864; cf. Futch v. Dugger, 874 F.2d 1483, 1485 (11th Cir. 1989) (written findings by state court is factor showing adequate development); (2) Dixon testified at Burden's trial--under oath and subject to direct, cross and redirect--that he had been given immunity. 111 S. Ct. at 864; (3) The prosecutor himself conceded in his closing argument at Burden's trial that Dixon had been granted immunity. 111 S. Ct. at 864; cf. Nelson v. Fulcomer, 911 F.2d 928, 931-32 (3d Cir. 1990) (state's "express acknowledgement[s] before trial court" militates against rejecting state-court finding).

In addition to these reasons, there are still more. First, the record before the state court was unequivocal. There was no evidence whatsoever contradicting the fact that Dixon received immunity. Second, the state judge who issued the post-trial report containing the finding that Dixon received immunity was fully familiar with the facts of the case, having himself appointed Kondritzer to represent both Burden and Dixon and having presided over Dixon's committal hearing. Finally, under Georgia law the prosecutor had the opportunity to review, correct and supplement the findings made in the state court's post-trial report. Ga. Code Ann. § 17-10-35(a). The prosecutor in this case did none of those

things.[5]

B.

As previously noted, the court below stated it would not accord a presumption of correctness to the state-court finding that Dixon testified under a grant of immunity. Having thus disregarded this Court's mandate, the court embraced the district court's observation--based on equivocal testimony elicited from the prosecutor at the federal evidentiary hearing--that Dixon had not received a formal grant of transactional immunity because, if he had, it would have been made in writing. See 975 F.2d at 774 n.9; id. at 775 (referring to No. 88-6-3-MAC, slip op. at 5). Upon this basis, the court affirmed the district court's conclusion that

[5]The court below gave only two reasons why it thought the state-court finding was not "adequately developed." First, it said the finding was not a finding of fact because it was contained in a report made merely for "administrative convenience." 975 F.2d at 773. Yet as long as the basis for a state court's finding of fact is adequate, as it is here, it makes no difference whether those findings appear in a post-trial report or "in the context of findings of fact or conclusions of law." Id. at 774. Section 2254(d) itself plainly does not require a state-court finding of fact to be made in any particular format. Moreover, because the state court's post-trial report at issue here is "use[d] to facilitate review of capital cases," id. at 773 n.8, federal courts may presume the state court's prepare such reports with the utmost care.

Second, the court below said that the "parties spent little time or effort debating" the question of Dixon's immunity because "this fact was only important as a means for [Burden] to impeach Dixon." Id. at 775. What the court below failed to appreciate was that the "parties spent little time or effort debating" the question because everyone agreed Dixon has immunity, not because it was important only for impeachment purposes. Parties do not spend time debating facts upon which they agree.

Burden's conflict-of-interest claim was meritless. Id. at 775. This conclusion is based on a constitutionally irrelevant distinction and ignores Burden's real claim. In addition, the decisions below create a rule of law that has no basis in and cannot be reconciled with this Court's decisions in Cuyler v. Sullivan, 446 U.S. 335 (1979), and Holloway v. Arkansas, 435 U.S. 475 (1978).

The district court made its observation that Dixon's immunity agreement was not in writing in its September 20 order. Contained under the heading "findings of fact," the isolated reference upon which the court of appeals rested its opinion says only that Dixon probably did not receive transactional immunity because, according to the prosecutor, it was common practice to put such agreements in writing. See No. 88-6-3-MAC, slip op. at 5.[6] However, as Judge Anderson

[6]Although not mentioned by the district court in its September 20 order, the prosecutor also testified that informal agreements such as the one Kondritzer negotiated for Dixon often led the state to dismiss charges against an accused. The prosecutor also testified that "many times" such informal agreements would not be reduced to writing. (T. Dist. Ct. Hrg. at 21-22) Moses also testified that immunity agreements would ordinarily not be made in writing:

> A. I believe that Mr. Kondritzer told me that Mr. Dixon was promised immunity.
>
> Q: That was my question. Did you ever see any formal document memorializing this?
>
> A: Not to my recollection. I wouldn't think there would be one.

(Tr. Dist. Ct. Hrg. at 51) Finally, as the court below recognized, Georgia law at the time of Burden's trial did not place any formal requirements on the ability of local

persuasively demonstrated in his dissent, the district court did not find that Dixon received no immunity at all. On the contrary, the district court expressly credited Kondritzer's testimony that Dixon had received some kind of immunity. See id. at 3 ("Mr. Kondritzer had informal discussions with [the prosecutor] which Mr. Kondritzer remembers resulting in 'an understanding, you know, as long as [Dixon] testified, nothing would happen to him.'").[2/]

Captivated by the vacuous distinction between formal and informal immunity, the court below wholly ignored the factual predicate for Burden's conflict claim. From the beginning, Burden has claimed only that Dixon testified pursuant to an informal immunity agreement, and that his own attorney had helped to secure that agreement. Burden has never staked his claim on the fact that the agreement was or had to be reduced to writing. Only in a footnote did the court below acknowledge that Burden "relies on informal negotiations between his attorney and the prosecutor to support his claim that Dixon testified under a grant of immunity." 975 F.2d at 774 n.9. The court speculated that "the record may be insufficient to support the state court's observation" that

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prosecutors to issue grants of immunity. See 975 F.2d at 774, n.9 (quoting State v. Hanson, 295 S.E.2d 297, 303 (Ga. 1982)). Even today, Georgia law places no formal requirements on grants of use immunity. Id.

[2/]The district court's initial opinion also acknowledged this fact. See 690 F. Supp. 1040, 1045 (M.D. Ga. 1988) ("Dixon . . . had been granted immunity from prosecution.").

Dixon received immunity if that immunity was based on informal negotiations. Id. (citing 28 U.S.C. § 2254(d)(8)).

The record, however, provides abundant support for that observation. To repeat: Dixon testified at trial that he received immunity, and the prosecutor conceded at trial that he had granted Dixon immunity. 111 S. Ct. at 864. Kondritzer himself later testified that he "reached 'an understanding' with the district attorney that 'as long as [Dixon] testified [against [Burden]] nothing would happen to [Dixon].'" Id. In the absence of a formal document conferring immunity, these facts can only be explained on the theory that Dixon's immunity was secured through informal negotiations and understandings. Cf. 975 F.2d at 776 (Anderson, J., dissenting) ("I respectfully submit that the district court did not find as a matter of fact that there was no informal understanding.") (emphasis added). Such informality is common in smaller communities.

However informal the process leading to the immunity agreement, or however informal the terms of the agreement itself, all the parties acknowledged--and the state court found--that an agreement had been made:

> The prosecutor (District Attorney Malone) during his closing argument at trial:
>
> > "[W]e may have offered [Dixon] immunity. I think you realized that we did. I'll tell you that we did."

(T. Trial at 911); see also 111 S. Ct. at 863 n.1.

Dixon during cross-examination at trial:

> Q. [By Moses]: "Now Mr. Dixon, have you been promised anything for your testimony today?"
>
> A. [By Dixon]: "Immunity."

(T. Trial at 649); see also 111 S. Ct. at 863 n.1.

Kondritzer at the federal evidentiary hearing:

> "I remember [the prosecutor] saying, 'I'm not interested in Henry Dixon as long as, you know, if he's going to testify we're not interested in prosecuting him."

(T. Dist. Ct. Hrg. at 43); see also 975 F.2d at 778 (Anderson, J., dissenting); cf. 111 S. Ct. at 846.

Moses at the federal evidentiary hearing:

> Q. [By Farmer]: "And as far as who worked out the immunity with Mr. Dixon or who worked, if you want to call it in street language, the deal for Mr. Dixon, you don't have any independent memory or independent knowledge of who did that do you?"
>
> A. [By Moses]: "Mr. Farmer, as I believe I told you . . . it's my recollection, I wouldn't--if somebody could show me different, it could be different, but I believe Mr. Kondritzer did that."

(T. Dist. Ct. Hrg. at 49).

These statements from the record, the express finding of the state court, the findings of the district court and this Court's own instructions on remand all establish one fact beyond dispute: Kondritzer negotiated immunity for Dixon at the same time that he was representing Burden. See 975 F.2d

at 778 (Anderson, J., dissenting) ("There was overwhelming evidence of an informal agreement that Dixon would not be prosecuted if he testified against Burden."). The only question on remand, and the only one open to the court below, was the legal consequence of this fact.

Nevertheless, because it found Dixon did not testify under a formal grant of transactional immunity, the majority below implicitly concluded that the undisputed and undeniable fact that Dixon testified under some kind of immunity had no legal consequence. To reach this conclusion, the majority established a new rule of law. Under this rule, an immunity agreement will be recognized for purposes of evaluating an alleged Sixth Amendment violation only if that agreement is reduced to writing or otherwise memorialized in documentary form. This rule has no foundation in reason or common sense; nor can it be reconciled with this Court's decisions in Cuyler v. Sullivan, 446 U.S. 335 (1980), and Holloway v. Arkansas, 435 U.S. 475 (1978). It is a rule whose true function is to avoid giving effect to the one fact upon which everyone--except the majority below--agrees.

The most basic duty of counsel is "the duty of loyalty." Strikland v. Washington, 466 U.S. 668, 692 (1984). When an attorney represents multiple defendants charged with the same offense, there is always a possibility that he may simultaneously represent conflicting interests, thereby breaching his duty of loyalty. A defendant establishes a

Sixth Amendment violation when he can "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler, 446 U.S. at 348. Once an actual conflict adversely affecting counsel's performance is shown, prejudice is presumed. Id. at 349-50. ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."). Under Cuyler, "a defendant [can] obtain relief without pointing to a specific prejudicial default on the part of his counsel, provided it is established that the attorney was 'actively represent[ing] conflicting interests.'" Nix v. Whiteside, 475 U.S. 157, 176 (1986) (quoting Cuyler, 446 U.S. at 350).

Cuyler's conflict of interest test is less demanding than Strickland's ineffective assistance of counsel standard because it does not require a showing of prejudice. Still less demanding is the test articulated in Holloway v. Arkansas, 435 U.S. 475 (1978). Under Holloway, reversal is automatic (no "actual conflict" need be shown) when the conflict issue is raised at or before trial, but the trial court fails to respond adequately to ensure that the defendant's right to the effective assistance of counsel is not infringed. See, e.g., Wood v. Georgia, 450 U.S. 261, 272 n.18 (1981) (reversal is "mandate[ed] when the trial court has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists") (internal

quotations omitted) (citation omitted).

While petitioner did not raise the conflict issue at trial, his claim should, under all the circumstances, be evaluated under Holloway, because the trial judge was aware of the circumstances giving rise to the conflict. Petitioner was not made aware of the conflict, but both Kondritzer and the trial judge knew that Kondritzer was simultaneously representing both Burden and Dixon, and that Kondritzer had negotiated the immunity agreement. Under these circumstances, Burden maintains that his conflict claim should be evaluated under the standard announced in Holloway, rather than that developed in Cuyler. In any event, a Sixth Amendment violation clearly exists under either standard.

As applied to the facts of this case, nothing in Cuyler or Holloway even remotely suggests that Dixon's immunity agreement must have been reduced to writing or otherwise formalized before it became relevant for purposes of analyzing Burden's Sixth Amendment conflict-of-interest claim. The rule announced by the majority below, based on the constitutionally irrelevant distinction between formal and informal immunity, places an unjustifiable and unfounded limitation on Cuyler and Holloway.

C.

The court below exceeded the scope of this Court's mandate and has created a rule of law that has no foundation in, and cannot be reconciled with, Cuyler or Holloway. Jimmie Burden has consistently maintained that his conviction and death sentence are unconstitutional because his own defense counsel negotiated immunity for the state's star witness against him. Even after this Court's clear command for the court below to "consider [Burden's] conflict-of-interest claim free from its erroneous failure to credit the state trial court's finding that Dixon testified under a grant of immunity," Jimmy Burden has still not received that consideration.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted so that Burden's conflict-of-interest claim can at last be considered "free from [the] erroneous failure to credit the state trial court's finding." Alternatively, the judgment below should be summarily vacated and the case again remanded to the Court of Appeals.

Respectfully submitted,

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April 12, 1993

APPENDIX

Jimmie BURDEN, Jr., Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

No. 88-8619.

United States Court of Appeals, Eleventh Circuit.

Oct. 5, 1992.

Petitioner appealed from order of the United States District Court for the Middle District of Georgia, 690 F.Supp. 1040, denying his habeas corpus petition. The Court of Appeals, 871 F.2d 956, remanded. On remand, the District Court, No. CIV-88-6-3-MAC, Wilbur D. Owens, Jr., Chief Judge, denied petition, and petitioner again appealed. The Court of Appeals, 903 F.2d 1352, affirmed, and petitioner sought writ of certiorari. The Supreme Court, 111 S.Ct. 862, reversed and remanded. The Court of Appeals, Tjoflat, Chief Judge, held that state trial court's comment that petitioner's nephew had testified under grant of immunity was not entitled to presumption of correctness.

Affirmed.

Anderson, Circuit Judge, dissented and filed an opinion.

1. **Criminal Law** ⇐992

Under Georgia law, jury's sentencing recommendation is binding on trial court, which actually sentences defendant. O.C.G.A. § 17-10-31.

2. **Criminal Law** ⇐1208.1(6)

Under Georgia law, trial court must file report in every case in which death penalty is imposed; this report is "administrative convenience" that Georgia Supreme Court uses to facilitate appellate review of capital cases. O.C.G.A. § 17-10-35(a).

3. **Habeas Corpus** ⇐768

Although state court finding of historical fact is generally entitled to presumption of correctness, this presumption does not attach where material fact at issue has not been adequately developed before state trial court. 28 U.S.C.A. § 2254(d), (d)(3).

4. **Habeas Corpus** ⇐702, 770

State trial court's comment that defendant's nephew, who was represented by same public defender as defendant, testified against defendant under grant of transactional immunity was not entitled to presumption of correctness where immunity issue was raised during cross-examination of nephew at trial, state trial court never held hearing on issue of nephew's immunity, court's limited comment on nephew's alleged immunity did not appear in context of findings of fact and conclusions of law, and colloquy between public defender and nephew failed to indicate what type of immunity deal nephew purportedly reached with state, who negotiated deal for nephew, or extent of nephew's and state's obligations under alleged deal. 28 U.S.C.A. § 2254(d), (d)(3).

Millard Farmer, Joseph M. Nursey, Atlanta, Ga., for petitioner-appellant.

Paula K. Smith, Mary Beth Westmoreland, Office of the Attorney General, Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before TJOFLAT, Chief Judge, FAY and ANDERSON, Circuit Judges.

TJOFLAT, Chief Judge:

In *Burden v. Zant*, 903 F.2d 1352 (11th Cir.1990) (*Burden II*), *rev'd and remanded in part*, — U.S. —, 111 S.Ct. 862, 112 L.Ed.2d 962 (1991) (*per curiam*), we rejected Jimmie Burden, Jr.'s claim that his counsel labored under a conflict of interest in violation of Burden's Sixth Amendment right to effective counsel. *Burden II*, 903 F.2d at 1361. Specifically, Burden alleged in his petition for a writ of habeas corpus under 28 U.S.C. § 2254 (1988), that his

counsel, while representing both him and Henry Lee Dixon, negotiated transactional immunity for Dixon, who wound up as the principal witness against Burden at trial. Burden advanced this factual allegation in support of his claim that a conflict of interest hampered his counsel's performance.

The Supreme Court remanded the case for us to "consider petitioner's conflict-of-interest claim free from [our] erroneous failure to credit the state trial court's finding[1] that Dixon testified under a grant of immunity." *Burden v. Zant*, — U.S. —, —, 111 S.Ct. 862, 865, 112 L.Ed.2d 962 (1991) (*per curiam*).[2] The state trial court's observation that Dixon testified under a grant of immunity appeared in a standard post-conviction report required under Georgia law in all capital cases as an administrative convenience to facilitate the Georgia Supreme Court's review. *See infra* note 6.

In this opinion, we make explicit that the state trial court's observation is not entitled to a presumption of correctness under 28 U.S.C. § 2254(d) because material facts were not adequately developed before that court. *Id.* § 2254(d)(3). Therefore, we once again affirm the district court's denial of Burden's habeas petition.

I.[3]

On August 1, 1981, the police arrested Jimmie Burden, Jr. on a charge of burglarizing his sister's home. Shortly thereafter, the state trial court appointed Kenneth Kondritzer, the public defender for the Middle Judicial Circuit of Georgia,[4] to represent Burden. On September 15, 1981, while Burden was awaiting trial on the burglary charge, his nephew, Henry Lee Dixon, gave a statement to the police implicating petitioner in the unsolved 1974 murders of Louise Wynn and her three children. Based on this statement, the police obtained warrants charging both Burden and Dixon with the four murders. The court appointed Kondritzer, who continued to represent Burden, to represent Dixon as well.

On November 19, 1981, the court held a committal hearing for Dixon in Washington County, Georgia. Kondritzer appeared on Dixon's behalf. The court determined at this hearing that there was not probable cause to hold Dixon for any of the murders; the court, however, granted the State's motion to require Dixon, as a material witness, to post a $50,000 bond to guarantee his appearance at trial. Dixon did not post this bond and remained in custody until the close of Burden's trial.

The grand jury indicted Burden on December 7, 1981, for the four murders. At the end of December, Kondritzer left the public defender's office, and Michael Moses, the other member of the public defender's office,[5] took over Burden's case. At Burden's trial in March 1982, Dixon's testimony provided the key evidence linking petitioner to the murders. The jury convicted petitioner on all counts.

At sentencing, the jury found one statutory aggravating circumstance and recommended death sentences for each murder.[6]

1. In our judgment, the state trial court's statements in the post-conviction report are not factual findings; they were not the product of an adversary proceeding before the court. *See infra* note 8. Rather, as we explain *infra* note 6, they constitute personal impressions of the trial judge rendered for the purpose of aiding the Georgia Supreme Court's appellate review.

2. In another part of its opinion, the Supreme Court noted its agreement with Burden's claim that we "improperly failed to give a presumption of correctness to a state-court factual finding, in violation of 28 U.S.C. § 2254(d)." *Burden*, — U.S. at —, 111 S.Ct. at 863. Considering that the Court did not suggest that none of the exceptions to a presumption of correctness listed in § 2254(d)(1)-(8) applies, we do not read its opinion as foreclosing our consideration of these exceptions.

3. For a complete exposition of the facts of this case, *see Burden II*, 903 F.2d at 1355-57, and *Burden v. State*, 250 Ga. 313, 297 S.E.2d 242 (1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1803, 76 L.Ed.2d 367 (1983).

4. The public defender's office had two members: Kondritzer, the public defender, and Michael Moses, his junior colleague.

5. *See supra* note 4.

6. Under Georgia law, the jury's sentencing recommendation is binding on the trial court,

The Georgia Supreme Court affirmed all four convictions and three of the four death sentences. *Burden v. State*, 250 Ga. 313, 297 S.E.2d 242 (1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1803, 76 L.Ed.2d 367 (1983).

[1] After exhausting his state remedies, Burden unsuccessfully sought a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia. *Burden v. Zant*, 690 F.Supp. 1040 (M.D.Ga.1988). On appeal, we remanded the case to the district court for an evidentiary hearing on Burden's conflict-of-interest claim because the record was not sufficient to permit a proper analysis of this claim. *Burden v. Zant*, 871 F.2d 956, 957 (11th Cir.1989) (*Burden I*). After the district court completed an evidentiary hearing and entered findings of fact and conclusions of law, we affirmed the district court's denial of the petition. *Burden II*, 903 F.2d at 1361. As previously noted, the Supreme Court subsequently reversed our decision with respect to one aspect of petitioner's conflict-of-interest claim and remanded the case. *Burden*, — U.S. at —, 111 S.Ct. at 865.

II.

Burden claims that his counsel, Kondritzer, secured transactional immunity for Dixon in exchange for Dixon's testimony against petitioner at trial.[7] According to Burden, this agreement effectively put Kondritzer in the position of having to sacrifice one client, Burden, in order to protect another client, Dixon. After striking a deal with the State, Kondritzer, to enforce the agreement, had to advise a key witness to implicate his own client. Thus, concludes petitioner, Kondritzer labored under a conflict of interest which adversely affected his representation of petitioner, in violation of petitioner's Sixth Amendment right to effective assistance of counsel.

In our prior opinion, we affirmed as not clearly erroneous the district court's conclusion, reached after a full evidentiary hearing, that "there is [no] evidence of transactional immunity being granted to Henry Lee Dixon...." *Burden II*, 903 F.2d at 1360. Neither the district court nor this court made explicit reference to the observation by the state trial court, in its mandatory post-conviction report, that Dixon testified under a grant of immunity. Specifically, our opinion did not explain why the state trial court's observation is not entitled to a presumption of correctness under 28 U.S.C. § 2254(d). We now make plain what once was unclear.

[2] As required under Georgia law, O.C.G.A. § 17-10-35(a) (1990), the state trial court in the present case completed a post-conviction report.[8] In an addendum to this standard questionnaire, the court, in explaining why it thought that the death sentence was appropriate in this case, described, among other things, Dixon's testimony. The court stated that "[t]he State's case depended primarily upon the testimony and credibility of Henry Lee Dixon which was corroborated by [Burden's] potential for violence.... Dixon was granted immunity from prosecution and the jury was properly informed of this fact and an appropriate charge was given by the court to the jury."

[3] A state court finding of historical fact is generally entitled to a presumption of correctness. 28 U.S.C. § 2254(d). In certain circumstances, however, this presumption does not attach. *See id.* § 2254(d)(1)-(8). As we explain below, we conclude that the material fact at issue here—whether Kondritzer negotiated and obtained transactional immunity for Dixon in exchange for testifying against petitioner—was not adequately developed before the state trial court. Therefore, pursuant to 28 U.S.C. § 2254(d)(3), we may not presume the correctness of the state trial court's comment on Dixon's immunity.[9]

There was never a hearing on the issue of Dixon's immunity in the state trial court and the court's comment on Dixon's immunity did not appear in the context of findings of fact and conclusions of law.[10] The trial court completed the post-conviction report based on its impression of what occurred during petitioner's trial. *See Burden*, — U.S. at —, 111 S.Ct. at 864.[11] The only *evidence* presented at trial suggesting that the State granted Dixon immunity in exchange for his testimony against Burden appeared in Dixon's response to Moses' questions on cross-examination. The examination went as follows:

> Q: (By Moses): Now, Mr. Dixon, have you been promised anything for your testimony today?
>
> A: (By Dixon): Immunity.
>
> Q: You've been promised immunity in order to testify? Is that correct?
>
> A: Correct.
>
> Q: Have you been told that you could get out of jail as soon as you testified?
>
> A: Not really.
>
> Q: Not really. What have you been told about you getting released from jail?
>
> A: I can't really say.

We would expect, then, to find some documentary evidence establishing that Dixon received a promise to forgo prosecution in exchange for his testimony pursuant to a court-approved agreement between his attorney and the prosecutor. The record, however, contains none. *See Burden II*, 903 F.2d at 1360. Petitioner instead relies on informal negotiations between his attorney and the prosecutor to support his claim that Dixon testified under a grant of immunity. Thus, the record may be insuffi-

which actually sentences the defendant. O.C.G.A. § 17-10-31 (1990).

7. Burden advances two other factual bases for his conflict-of-interest claim, *see Burden II*, 903 F.2d at 1360, neither of which is affected by the Supreme Court's remand and therefore before us today.

8. Under Georgia law, a trial court must file a report in every case in which the death penalty is imposed. O.C.G.A. § 17-10-35(a). This report is "an administrative convenience" that the Georgia Supreme Court uses to facilitate appellate review of capital cases. *Thomas v. State*, 240 Ga. 393, 242 S.E.2d 1, 7 (1977), *cert. denied*, 436 U.S. 914, 98 S.Ct. 2255, 56 L.Ed.2d 415 (1978). The report itself is a standard 6½-page questionnaire, designed to elicit information about the defendant, the crime, and the circumstances of the trial. It requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality of sentence. Included in the report are responses to detailed questions concerning the quality of the defendant's representation, whether race played a role in the trial, and, whether, in the trial court's judgment, there was any doubt about the defendant's guilt or the appropriateness of the sentence.

Gregg v. Georgia, 428 U.S. 153, 167-68, 96 S.Ct. 2909, 2922, 49 L.Ed.2d 859 (1976).

9. At the time of petitioner's trial, it had "been indicated, although not decided, that[, under Georgia law,] a prosecutor may make an agreement to forgo prosecution only with the approval of the court." *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297, 303 (1982); *see also Smith v. State*, 74 Ga.App. 777, 41 S.E.2d 541, 546-48 (dictum), *cert. denied*, 332 U.S. 772, 68 S.Ct. 86, 92 L.Ed. 357 (1947). Indeed, the prosecutor in charge of petitioner's case, who allegedly offered Dixon immunity, testified in the district court that "in each instance ... where a person was given transactional immunity, it was done so in writing." Six months after the jury convicted petitioner, the Georgia Supreme Court held that "a valid promise to forgo prosecution ... must, first, contain a description of the crimes or transactions in regard to which an individual is excused from prosecution. Secondly [sic], the prosecutor must obtain court approval of an agreement to forgo prosecution." *Hanson*, 295 S.E.2d at 302. (These requirements do not apply to agreements to testify in exchange for use immunity.)

10. In our view, these observations alone render § 2254(d)'s presumption of correctness inapplicable. *See supra* note 1. Section 2254(d) unequivocally applies only to "a determination after a hearing on the merits of a factual issue, made by a State court ... in a proceeding to which the applicant for the writ and the State ... were parties...." 28 U.S.C. § 2254(d). Perhaps equally important, half of the exceptions to § 2254(d)'s presumption of correctness, including the one we discuss in this opinion, *id.* § 2254(d)(3), on their face apply only to state court findings made pursuant to a hearing. *See id.* § 2254(d)(1), (2), (3), (6). With all due respect to the High Court, we believe that *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), is not to the contrary. There, unlike in the present case, both parties were "given an opportunity to be heard and [the issue] received plenary consideration" before the appellate court made its finding. *Id.* at 546, 101 S.Ct. at 768. We nevertheless are bound by the Supreme Court's opinion which suggests, without discussion of *Sumner* or the explicit language of § 2254(d), that § 2254(d) does apply.

11. The trial court noted in its report that it also relied on unspecified information provided by petitioner's counsel.

cient to support the state court's observation. *See* 28 U.S.C. § 2254(d)(8). We, however, do not rely on this deficiency in deciding that the state trial court's observation is not entitled to a presumption of correctness.

Q: Your Honor, I ask that you direct the witness to answer my question.

....

BY THE COURT: I think he said I can't say, and I don't know whether that means his inability to say or he doesn't know or what reason, and I would let counsel for the defendant exhaust it further. Now, if you have a reason, I don't understand when you say I can't say. Perhaps, you don't know. I don't know what your answer is in that regard. That's not descriptive to me nor to the jury, so please elaborate.

A: I just don't know.

BY MR. MOSES: You just don't know?

A: No.

The trial court's impression that Dixon had received immunity also may have arisen from counsels' closing arguments to the jury. The prosecutor stated that "[Dixon's] testimony may have, granted, we may have offered him immunity. I think you realize that we did. I'll tell you that we did. Nothing ever came of it because the Court dismissed the charges as was stipulated." Similarly, Moses, in closing, argued that Dixon "acknowledged ... on the stand that he received immunity, don't know for what, but [he] received it."

[4] In our opinion, it is clear that whether Kondritzer actually negotiated and obtained transactional immunity for Dixon from the prosecution in exchange for Dixon's testimony against petitioner was not adequately developed in the state trial court. At trial, this fact was only important as a means for petitioner to impeach Dixon; therefore, the parties spent little time or effort debating it.[12] Furthermore, Moses' cross-examination of Dixon raised more questions than it resolved: this colloquy does not settle what type of deal Dixon purportedly reached with the State; who, if anyone, negotiated this deal for Dixon; or the extent of Dixon's and the State's obligations under this deal. It is this very uncertainty surrounding key factual questions relevant to Burden's allegation that Dixon testified under a grant of transactional immunity negotiated by Burden's counsel that prompted us to order a federal evidentiary hearing.[13] *See Burden I*, 871 F.2d at 957.

Thus, in our judgment, it would be improper to presume the correctness of the state trial court's comment about Dixon's immunity. Rather, it was essential that the district court, on habeas corpus review, conduct a full and fair hearing regarding the facts surrounding petitioner's claim. Only in this way could the parties adequately develop the material facts of petitioner's claim—principally, whether Dixon testified under a grant of transactional immunity that Kondritzer obtained from the prosecution—so that we could make an informed decision concerning the merits of this claim.

After a full hearing, the district court concluded that Dixon did not testify under a grant of transactional immunity or pursuant to a promise that the State would not prosecute him for his part in the crimes at issue. This finding by the district court is not clearly erroneous. Therefore, we affirm the district court's conclusion that petitioner's conflict-of-interest claim is meritless. *See Burden II*, 903 F.2d at 1359–60.

III.

In summary, we hold that the state trial court's comment that Dixon testified under a grant of immunity is not entitled to a presumption of correctness because this material fact was not adequately developed before the trial court. Instead, we affirm the district court's finding, which was reached after a full and fair evidentiary hearing, that Dixon did not testify under a grant of immunity. Accordingly, we conclude that petitioner's conflict-of-interest claim is meritless.

The judgment of the district court is, accordingly,

AFFIRMED.

ANDERSON, Circuit Judge, dissenting:

Respectfully, I dissent. The crucial issue is whether Burden's counsel, Kondritzer, labored under an actual conflict of interest that adversely affected his performance because Kondritzer, while representing both Burden and Dixon, reached an understanding with the prosecutor that Dixon would not be prosecuted in exchange for his testimony against Burden. There is no disagreement as to the appropriate legal test. *See Burden v. Zant*, 903 F.2d 1352 (11th Cir.1990) (whether actual conflict of interest adversely affected counsel's performance). Furthermore, the majority seems to acknowledge that an actual conflict of interest adversely affecting performance would be established upon proof that counsel, while representing two persons charged with a murder, reached an informal understanding with the prosecutor that one of the defendants would not be prosecuted in exchange for his testimony against the other.[1] Finally, there seems to be agreement that Kondritzer was in fact representing both Burden and Dixon at the crucial time, i.e., the time that the alleged "deal" for Dixon was made. I dissent because I respectfully disagree with the majority's decision to deny relief on the basis of a purported fact finding by the district court "that Dixon did not testify under a grant of transactional immunity or pursuant to a promise that the state would not prosecute him for his part in the crimes at issue." Opinion of Chief Judge Tjoflat at 9.

As an initial matter, I note that the majority's factual assumption would be undermined if the state court's factual finding that "Dixon was granted immunity from prosecution" were presumed to be correct. Even if the majority is correct in concluding that the state court's finding is not entitled to deference, I nevertheless submit that the majority's conclusion is erroneous. The majority assumes that the district court made a finding of fact not only that there was no formal grant of transactional immunity, but also that there was no informal understanding that Dixon would not be prosecuted if he testified against Burden. I respectfully submit that the district court did not find as a matter of fact that there was no informal understanding.

Review of the district court's order indicates that the district court found as a fact:

> After the committal hearing Mr. Kondritzer had informal discussions with Chief Assistant District Attorney Malone which Mr. Kondritzer remembers resulting in "an understanding, you know, as long as he testified, nothing would happen to him."

District Court Order at 4. In the very next paragraph, the district court also found:

> According to Chief Assistant District Attorney Malone, transactional immunity, if and when granted, was formally agreed to by the district attorney and all the parties. He has no recollection nor is there any other evidence of transactional immunity being granted to Henry Lee Dixon.

District Court Opinion at 5. I submit that, in context, the only reasonable reading of the district court's order is that the district court found as a fact that there was no formal grant of transactional immunity,

12. Indeed, at the district court's evidentiary hearing on this matter, the prosecutor testified that he did not consider Dixon's testimony regarding the immunity issue, at the time of the trial, to have been "significant or important."

13. The recent case of *Keeney v. Tamayo-Reyes*, — U.S. —, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), is inapposite. *Keeney* held that a habeas petitioner will be entitled to a federal hearing on facts he or she failed to develop in state court only if he or she either (1) establishes cause for failing to develop the facts in state court and prejudice arising from that failure or (2) demonstrates that a fundamental miscarriage of justice would result from the denial of a federal hearing. *Id.* at —, 112 S.Ct. at 1720–21. *Keeney* did not affect a federal court's discretion to hold an evidentiary hearing on material facts not adequately developed in state court, even if the hearing is not mandatory. *See id.* at —, 112 S.Ct. at 1727 (O'Connor, J., dissenting). More specifically, *Keeney* did not require a party in a habeas proceeding to establish cause and prejudice in order to establish that material facts were not developed in the state court.

1. Because, in my judgment, the record shows that Kondritzer reached an informal understanding with the prosecutor that Dixon would not be prosecuted in exchange for his testimony against Burden, I need not reach the question whether an actual conflict of interest adversely affecting performance would be established if the evidence indicated that there was no meeting of the minds in fact, but that Kondritzer believed that there was. However, it seems likely that the effect on Kondritzer's performance would be the same.

but that the district court made no finding at all as to whether there was an informal understanding between Kondritzer and the prosecutor that Dixon would not be prosecuted if he testified against Burden.

Possibly the majority has read the phrase, "nor is there any other evidence of transactional immunity being granted to Henry Lee Dixon," as a finding of fact that there was no informal understanding regarding Dixon. Several factors persuade me, however, that such an interpretation would be a misreading of the district court's order. First, the language the majority cites, *see* Opinion of Chief Judge Tjoflat at 5, appears in the context of the district court's discussion of a formal grant of transactional immunity. Second, my interpretation of the district court's meaning reconciles the language the majority cites with the immediately preceding paragraph in which the district court found that Kondritzer remembered informal discussions with the prosecutor resulting in an understanding that nothing would happen to Dixon as long as he testified. Third, the colloquy between the court and counsel during the evidentiary hearing, *see infra*, reveals that the district court sharply distinguished in its mind between a formal grant of transactional immunity and an informal understanding. It is clear that the district court did not consider an informal agreement that Dixon would not be prosecuted to be a grant of immunity. Finally, when the district court said, "nor is there any other evidence of transactional immunity being granted to Henry Lee Dixon," the district court obviously was referring to a formal grant of immunity, rather than an informal understanding that Dixon would not be prosecuted, because there was unequivocal evidence (detailed below) that there was such an informal understanding. Thus, the district court could not have said, in the face of this record, that there is no evidence of an informal understanding that Dixon would not be prosecuted.

At the evidentiary hearing, Kondritzer testified as follows on direct examination by Burden's counsel.

> Q. And as far as Henry Lee Dixon is concerned, you represented him at the preliminary hearing?
>
> A. Yes.
>
> Q. And after the preliminary hearing, did you have discussions with Mr. Malone about immunity and about him not being prosecuted in the case?
>
> A. Yes, I believe so.
>
> Q. Describe those discussions and what were the results of them.
>
> A. Well, what I remember, informal discussions, nothing—asking him what was going to happen to Dixon and my memory of it is it was an understanding, you know, as long as he testified, nothing would happen to him.

First Supplemental Record on Appeal, Vol. 2, at 28. On cross-examination by the state, Kondritzer testified as follows:

> Q. Do you recall ever having any discussions with Mr. Malone about potential immunity for Mr. Dixon?
>
> A. Yes. I believe we—I asked him occasionally what the deal was with Mr. Dixon.
>
> The Court: Well now, a deal doesn't itself mean transactional immunity. Now, be more specific. What are you talking about?
>
> Mr. Kondritzer: Well, I remember this was very unusual about being held—I thought it was unusual to hold him as a material witness and I, you know, believe I had asked Mr. Malone what, was he just going to sit in jail, you know, forever, you know, until they got around to doing something. I thought it was unusual.
>
> The Court: But beyond that, what are you talking about? We know it's unusual; the Superior Court judge was the one who was holding him.
>
> Mr. Kondritzer: I believe we—you know, I believe it was understood between myself and Mr. Malone that nothing would happen to Mr. Dixon down the road.
>
> The Court: But the fact that he tells you Mr. Dixon isn't going to be prosecuted doesn't in and of itself say that he's immunized when he testifies.
>
> Mr. Kondritzer: Yes.
>
> The Court: Isn't that right?
>
> Mr. Kondritzer: Well, I would think if he said he's not—if he said he's not going to be prosecuted, wouldn't that mean he's—it would seem to indicate he's immunized, if he's not going to be prosecuted.
>
> The Court: It wouldn't in this court; now, it might in somebody else's.
>
> Mr. Kondritzer: Well, I'm—what's—I'm confused. What's the—
>
> The Court: Well, I'm trying to understand what you are telling us. You just come out with a general statement that you understood so-and-so, which to me, doesn't add up to immunity in a legal sense.
>
> Mr. Kondritzer: Well, all I can—you know, I'm doing the best I can, your honor, and I apologize if I'm—
>
> The Court: No, all I want you to do is tell us the facts as you remember them.
>
> Mr. Kondritzer: My memory is that I had some agreement with Mr. Malone that nothing would happen to Mr. Dixon.
>
> The Court: But you don't recall any particular agreement, is that what you are telling us?
>
> Mr. Kondritzer: Yes, you mean a specific—
>
> The Court: A specific understanding, yes sir.
>
> Mr. Kondritzer: Well, I recall an understanding and I don't know what you mean by, you know, specific.
>
> The Court: Well, the details of the understanding. See, an understanding is a bald conclusion.
>
> Mr. Kondritzer: What I remember is just a—that's what I remember is this understanding between us.
>
> The Court: Well, do you remember anything beyond your understanding that he was not going to prosecute him?
>
> Mr. Kondritzer: Beyond that, no sir.

Id. at 37–39. Later in his testimony, Kondritzer reiterated that it was his understanding with the prosecutor that Dixon would not be prosecuted. *Id.* at 41. Shortly thereafter, Kondritzer testified: "I remember him [the prosecutor] saying, 'I'm not interested in Henry Dixon as long as, you know, if he's going to testify. We're not interested in prosecuting him,' words to that effect." *Id.* at 43.

The above colloquy between the court and counsel reveals the district court's belief that an informal agreement not to prosecute does not constitute immunization. Thus, the district court's statement: "nor is there any other evidence of transactional immunity being granted to Henry Lee Dixon," was obviously referring to a formal grant of immunity and does not constitute a finding of fact that there was no informal understanding between the prosecutor and Kondritzer that Dixon would not be prosecuted.

If the district court had made such a finding, I respectfully submit that it would be clearly erroneous. There was overwhelming evidence of an informal agreement that Dixon would not be prosecuted if he testified against Burden. The very clear testimony of Kondritzer to that effect is set out above. Dixon testified at trial that he had been promised immunity for his testimony. In his closing argument to the jury at trial, the prosecutor, Malone, conceded that Dixon had been granted immunity. Finally, Mr. Moses, who inherited Burden's case from Kondritzer and tried it to the jury, testified that it was his understanding that Kondritzer had worked out the arrangement that Dixon would not be prosecuted if he testified against Burden. Moses based his understanding upon what Kondritzer and Dixon had told Moses. *Id.* at 48–51, 56–57, 59. The only evidence tending to suggest that there was no such informal arrangement is prosecutor Malone's testimony:

> Q. Do you recall ever having any discussions with Mr. Kondritzer about immunity for Mr. Dixon?
>
> A. Let me make this clear, I do not recall any conversations. That is not to say they did not occur. I do not recall them, if they did occur.

Id. at 18–19. Thus, there is unequivocal evidence from four different sources that there was an informal agreement that Dixon would not be prosecuted if he testified against Burden. The only contrary evidence is the prosecutor's inability to recall

the conversations, and even this is undermined by his candid testimony that he could not testify that the conversations did not occur and, more significantly, by his contemporaneous concession that immunity was granted in his closing argument to the jury at trial.

In summary, I respectfully submit that the district court did not make a finding of fact that there was no informal understanding between the prosecutor and Kondritzer that Dixon would not be prosecuted if he testified against Burden. Furthermore, had the district court made such a finding, I submit that it would have been clearly erroneous.

For these reasons, I dissent.

Jimmie BURDEN, Jr.

v.

Walter ZANT, Warden.

No. 90-5796.

Feb. 19, 1991.

Petitioner appealed from order of the United States District Court for the Middle District of Georgia, 690 F.Supp. 1040, denying habeas petition. The United States Court of Appeals for the Eleventh Circuit, 871 F.2d 956, remanded. On remand, the District Court, No. CIV-88-6-3-MAC, Wilbur D. Owens, Jr., Chief Judge, denied petition, and petitioner again appealed. The Court of Appeals, 903 F.2d 1352, affirmed, and petitioner sought writ of certiorari. The Supreme Court held that state trial court's finding that codefendant had testified under an immunity agreement was entitled to presumption of correctness in federal habeas proceeding.

Reversed and remanded.

1. Habeas Corpus ⇐770

State trial court's finding that codefendant had testified under an immunity agreement was entitled to presumption of correctness in federal habeas proceeding in which petitioner claimed that defense counsel's simultaneous representation of petitioner and codefendant created conflict of interest. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

2. Habeas Corpus ⇐768

Habeas court may not disregard statutory presumption of correctness given to state court determinations of historical fact unless one of the enumerated exceptions of habeas statute is met, and it explains reasoning in support of that conclusion. 28 U.S.C.A. § 2254(d).

3. Habeas Corpus ⇐824

On appeal in federal habeas proceeding, petitioner sufficiently emphasized state trial court's finding the codefendant received immunity in state murder trial to permit petitioner to rely on statute entitling state trial court's factual findings to presumption of correctness; petitioner repeatedly stated in his conflict of interest argument in his first appellate brief that codefendant had testified under grant of immunity, and made immunity agreement central fact supporting his conflict of interest claim in supplemental letter brief after remand. 28 U.S.C.A. § 2254(d).

PER CURIAM.

Petitioner argues that the Court of Appeals, in rejecting his conflict-of-interest claim, improperly failed to give a presumption of correctness to a state-court factual finding, in violation of 28 U.S.C. § 2254(d). We agree, and accordingly the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

On August 1, 1981, petitioner was arrested on a charge of burglarizing his sister's house. Kenneth Kondritzer, a local public defender in a two-attorney public defender's office, was appointed soon thereafter to represent petitioner. While petitioner was awaiting trial on the burglary charge, his nephew, Henry Lee Dixon (the son of the alleged burglary victim), gave a statement to the police implicating petitioner in the unsolved 1974 murders of a woman and her three children. Based upon Dixon's statement, the police obtained warrants on or about September 15, 1981, charging both petitioner and Dixon with the murders. Kondritzer began representing Dixon at about that time, while continuing to represent petitioner. Dixon, however, was never indicted for the murders. At a preliminary hearing on November 19, 1981, in which Kondritzer appeared on Dixon's behalf, the judge ruled that although the State had sufficient evidence to hold Dixon as a material witness against Burden, it did not have sufficient evidence to hold him for the murders.

Petitioner was indicted for the murders on December 7, 1981, while he was still represented by Kondritzer. Kondritzer, however, left the public defender's office at the end of December 1981, and the other public defender in the office, Michael Moses, assumed responsibility for representing petitioner.

After a trial in March 1982, petitioner was convicted of four counts of murder, and was sentenced to death. Dixon's testimony at trial provided the sole evidence directly linking petitioner to the murders. 903 F.2d 1352, 1356-1357 (CA11 1990). In addition, both Dixon on cross-examination and the prosecutor in his closing argument acknowledged that Dixon was testifying under a grant of immunity,[1] a fact expressly credited by the trial court in its mandatory post-trial report, see Record, Respondent's Exh. 1, p. 54.[2]

After exhausting his state remedies, petitioner filed a petition for a writ of habeas corpus in the United States District Court

1. In response to the question, "[H]ave you been promised anything for your testimony today?," Dixon stated, "Immunity." Record, Respondent's Exh. 1G, p. 649 (trial transcript). The prosecutor likewise acknowledged to the jury, "[W]e may have offered [Dixon] immunity. I think you realize that we did. I'll tell you that we did." Record, Respondent's Exh. 11, p. 911 (trial transcript).

2. Under Ga.Code Ann. § 17-10-35(a) (1990), the trial court must file a report in every case in which the death penalty is imposed. Designed to facilitate review by the Georgia Supreme Court, this report must include, *inter alia*, the trial judge's assessment of the prosecution's case at trial. See generally *Gregg v. Georgia*, 428 U.S. 153, 167-168, 96 S.Ct. 2909, 2922-2923, 49 L.Ed.2d 859 (1976) (joint opinion). The report in petitioner's case notes that Dixon was "[t]he witness most damaging to the defendant's case." Record, Respondent's Exh. 1, p. 54. It also states that "Dixon was granted immunity from prosecution and the jury was properly informed of this fact and an appropriate charge was given by the court to the jury." *Ibid.*

for the Middle District of Georgia, alleging, *inter alia*, that he did not receive effective assistance of counsel because his counsel labored under a conflict of interest. Although the District Court credited petitioner's contention that Dixon had received immunity in exchange for his agreement to testify against petitioner, 690 F.Supp. 1040, 1045 (1988), it nevertheless denied relief because petitioner had not shown an adverse impact on the representation of his *trial* counsel, Moses. *Ibid.*

On appeal, the United States Court of Appeals for the Eleventh Circuit determined that the record was not sufficient for it to evaluate petitioner's conflict-of-interest claim, and therefore remanded to the District Court for an evidentiary hearing on that issue, while retaining jurisdiction over the case. 871 F.2d 956 (CA11 1989). At the hearing, Kondritzer testified that while he was representing both petitioner and Dixon on the murder charges, he reached "an understanding" with the district attorney that "as long as [Dixon] testified [against petitioner] nothing would happen to him." Civ. Action No. 88–6–3–MAC (MD Ga., Sept. 20, 1989), p. 4. The District Court nevertheless concluded that petitioner had received representation free from a conflict of interest.

The case then returned to the Court of Appeals, which affirmed the District Court's denial of habeas relief. Although the court recognized the potential conflict of interest in Kondritzer's simultaneous representation of petitioner and Dixon, it held that "the conflict never became actual in the sense that Kondritzer's representation of Dixon's interests required him to compromise [petitioner's] interests." 903 F.2d, at 1359. In addressing petitioner's argument that the dual representation adversely affected petitioner's interests because Kondritzer negotiated an immunity agreement for Dixon, the Court of Appeals stated:

> "[T]he assumption that Dixon received a grant of transactional immunity, negotiated by Kondritzer and the prosecutor in exchange for Dixon's testimony against [petitioner], is without factual support.... There is no documentary evidence of any sort that attests to Dixon's having received immunity.... Thus, [petitioner] can no longer base his conflict-of-interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another." *Id.*, at 1359–1360.

[1, 2] As petitioner argues, the Court of Appeals' finding that Dixon did not testify under an immunity agreement is contrary to the express finding in the state trial court's report that "Dixon was granted immunity from prosecution." Record, Respondent's Exh. 1, p. 54. This finding, made pursuant to statutory directive, see n. 2, *supra*, and based on Dixon's testimony and the prosecutor's closing argument at trial, see n. 1, *supra*, is a determination of historical fact "presumed to be correct" for purposes of a federal habeas corpus proceeding. See 28 U.S.C. § 2254(d).[3] A habeas court may not disregard this presumption unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met, and it explains the reasoning in support of that conclusion. See *Sumner v. Mata*, 449 U.S. 539, 549, 551, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981). The Court of Appeals did not even *mention* the trial court's finding that Dixon received immunity, much less explain why that finding is not entitled to a presumption of correctness.

3. Section 2254(d) provides in pertinent part:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct...."

[3] Respondent maintains that petitioner "waived" reliance on § 2254(d) in the Court of Appeals by failing sufficiently to emphasize the trial court's finding that Dixon received immunity. This contention mischaracterizes the record. In his first brief to the Court of Appeals, before remand, petitioner repeatedly stated, in support of his conflict-of-interest argument, that Dixon had testified under a grant of immunity. See Brief for Petitioner-Appellant in No. 88–8619 (CA11), pp. 5, 6, 8, 11, 13–14, 15, 17, 22, 23. Indeed, that factual assertion was the crux of petitioner's argument. In his supplemental letter brief, after remand, the immunity agreement was again the central fact supporting his conflict-of-interest claim. The brief began by stating that petitioner did not understand why there was a dispute over Dixon's immunity, since the state trial judge had specifically found that Dixon had testified under a grant of immunity. Letter Memorandum for Petitioner-Appellant in No. 88–8619 (CA11), p. 1; see also *id.*, at p. 9. Petitioner then asserted that the state court's finding was "entitled to the presumption of correctness." *Ibid.* Thus, it seems clear that petitioner adequately raised the argument below.

Consequently, we reverse and remand so that the Court of Appeals may consider petitioner's conflict-of-interest claim free from its erroneous failure to credit the state trial court's finding that Dixon testified under a grant of immunity.

It is so ordered.

Jimmie BURDEN, Jr.,
Petitioner–Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent–Appellee.

No. 88–8619

United States Court of Appeals,
Eleventh Circuit.

May 29, 1990.

Habeas petition was filed. The United States District Court for the Middle District of Georgia, 690 F.Supp. 1040, denied petition. Petitioner appealed. The Court of Appeals, 871 F.2d 956, remanded. The District Court, No. CIV–88–6–3–MAC, Wilbur D. Owens, Jr., Chief Judge, denied petition. Petitioner appealed. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) petitioner was not denied effective assistance of counsel in state murder trial; (2) prosecutor's comments in closing argument at sentencing phase of state capital murder trial were not improper; and (3) jury instruction at penalty phase was adequate.

Affirmed.

1. **Criminal Law ⇐641.5**

Sixth Amendment right to effective assistance of counsel entails right to representation unimpaired by actual conflict of interest on part of defense counsel. U.S.C.A. Const.Amend. 6.

2. **Criminal Law ⇐641.13(1)**

When analyzing ineffective assistance of counsel claim, Court of Appeals first asks whether counsel's performance, measured by professional norms prevailing at time, was deficient and, if so, whether deficient performance prejudiced defendant. U.S.C.A. Const.Amend. 6.

3. **Criminal Law ⇐641.5(3, 4)**

In evaluating claim of ineffective assistance of counsel based on actual conflict of interest on part of defense counsel, inquiry is abbreviated and prejudice is presumed if—but only if—defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected lawyer's performance. U.S.C.A. Const.Amend. 6.

4. **Criminal Law ⇐641.5(3, 7)**

Defense counsel's multiple representation of defendants does not necessarily result in ineffective assistance of counsel based on actual conflict of interest; where defendant has not objected to counsel's representation of another, defendant still must show actual conflict and address effect of that conflict. U.S.C.A. Const.Amend. 6.

5. **Criminal Law ⇐641.5(6)**

Public defender's representation of defendant and his nephew, who were being investigated for same murders, did not result in conflict of interest which rendered representation ineffective where public defender, while representing defendant, did not call nephew to stand at nephew's committal hearing and did not elicit testimony prejudicial to defendant; rather, charges against nephew were eventually dropped and potential conflict of interest never became actual. U.S.C.A. Const.Amend. 6.

6. **Criminal Law ⇐641.5(6)**

Evidence did not support defendant's claim that his nephew, who was being investigated with defendant for murder, received grant of transactional immunity negotiated by public defender, who was representing both defendant and nephew, in exchange for nephew's testimony against defendant and, therefore, public defender's representation of both defendant and nephew did not result in conflict of interest which rendered counsel ineffective; impression of nephew that he would not be prosecuted as long as he testified did not establish grant of either formal or informal immunity. U.S.C.A. Const.Amend. 6.

7. **Criminal Law ⇐641.5(6)**

There was no actual conflict of interest which rendered public defender ineffective when public defender representing defendant interviewed defendant's nephew, who was being investigated for same murder and who was represented by another public defender, where defendant's counsel did not represent nephew before or after departure of other public defender from office. U.S.C.A. Const.Amend. 6.

8. **Criminal Law ⇐641.13(1)**

Standard for measuring deficient performance of defense counsel is an objective one: reasonableness under prevailing professional norms. U.S.C.A. Const.Amend. 6.

9. **Criminal Law ⇐1144.10**

Reviewing court's scrutiny of defense counsel's performance should be highly deferential. U.S.C.A. Const.Amend. 6.

10. **Criminal Law ⇐641.13(4)**

Inexperience of defense counsel does not constitute ineffectiveness per se: defendant who relies on allegations of counsel's inexperience in support of ineffective assistance of counsel claim must still make two-part showing of deficient performance and prejudice. U.S.C.A. Const.Amend. 6.

11. **Criminal Law ⇐641.13(6)**

Fact that defense counsel did not interview all persons now suggested as potential witnesses did not mean that his investigation of murder was inadequate; defense counsel interviewed all of state's witnesses that he could locate, and it was evident that due to eight-year time lapse, faulty memories of those interviewed, and defendant's own inability to remember his whereabouts on day of murders, no alibi witnesses could be found by further investigation. U.S.C.A. Const.Amend. 6.

12. **Criminal Law ⇐641.13(2)**

Defense counsel's decision not to emphasize murder defendant's background because it was so similar to that of many persons in the area was a tactical decision and did not show that defense counsel was unaware of background information and did not establish ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

13. **Criminal Law ⇐641.13(7)**

Defense counsel's failure to present sympathetic character witnesses was not ineffective assistance of counsel; defense counsel decided at guilt phase of capital murder trial not to call character witnesses for fear that state would counter by presenting evidence of defendant's prior convictions, defense counsel chose at sentencing phase not to mention defendant's good behavior in prison because of risk that introduction of prison records would do more harm than good and, although defense counsel considered calling defendant's mother and sisters to present mitigating evidence at sentencing phase, he decided against the tactic on the basis that mother would not have a presentable witness and defendant had just been convicted of burglarizing home of one sister. U.S.C.A. Const.Amend. 6.

14. **Criminal Law ⇐641.13(2)**

Defendant failed to demonstrate that professional standards prevailing at time of his capital murder trial required defense counsel to challenge composition of jury pool and, accordingly, defendant failed to show ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

15. **Habeas Corpus ⇐489**

For state court evidentiary ruling to merit federal habeas corpus relief, ruling must have deprived petitioner of fundamental fairness, thereby depriving him due process of law. U.S.C.A. Const.Amends. 5, 14.

16. **Constitutional Law ⇐266(4)**
Criminal Law ⇐371(4, 12), 372(4)

Georgia state court ruling that extrinsic acts evidence, six or seven years after murder for which defendant was on trial, defendant violently assaulted two women when they refused to have intercourse with him and that defendant had been drinking heavily on those occasions, was admissible in murder prosecution did not render defendant's trial fundamentally unfair and did not deny him due process; there was rational connection between extrinsic acts evidence and murder which occurred after defendant had been drinking, after defendant had been kissing and hugging victim, and after defendant stated that victim had not been "acting right." U.S.C.A. Const. Amends. 5, 14.

17. **Habeas Corpus ⇐497**

Proper prosecutorial argument, no matter how prejudicial or persuasive, can never be unconstitutional, and even improper statements will not warrant habeas relief unless they render sentencing proceeding fundamentally unfair.

18. **Criminal Law ⇐713, 723(1)**

Prosecutor's reference in closing argument at sentencing phase of state capital murder trial to widespread publicity and community anger was not improper inasmuch as reference to widespread publicity was to a matter in evidence, and although there was no record evidence regarding community feeling, jurors were members of community and would know what community reaction to murders was.

19. **Criminal Law ⇐723(5)**

Prosecutor's reference in closing argument at sentencing phase of state capital murder trial to race of victims was not improper; race of victims was a matter of record evidence, record disclosed that prosecutor was arguing the absence of mitigating circumstances, and statement was an appeal to jury not to let itself be swayed by race of victims rather than an impermissible appeal to jury's sympathy for victims on account of their race.

20. **Criminal Law ⇐723(1)**

Prosecutor's statement in closing argument at sentencing phase of state capital murder trial referring to strength and courage of Americans, including those who had gone to war, in standing up to "forces of evil" was not improper; speech focused on deterrence which was legitimate justification for death penalty.

21. **Constitutional Law ⇐266(7)**

To satisfy constitutional requirement of due process in criminal trial, state must prove beyond a reasonable doubt every fact that constitutes essential element of crime charged against defendant. U.S.C.A. Const.Amends. 5, 14.

22. **Criminal Law ⇐1159.2(7)**

When considering sufficiency of evidence on review, proper inquiry is not whether reviewing court itself believes that evidence established guilt beyond a reasonable doubt but whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt.

23. **Homicide ⇐250**

Evidence was sufficient to sustain conviction for malice murder with respect to each victim; one victim died of multiple blows to head while two victims were drowned and one died from strangulation, there was evidence of struggle and according to testimony of defendant's nephew, the nephew had driven defendant who had been drinking heavily and victims to pond and left them there, and when he returned two hours later and found defendant alone, defendant replied that he hit one victim on head and that he knew where other victims were as well. O.C.G.A. § 16-5-1.

24. **Homicide ⇐311**

Jury instruction at penalty phase of state capital murder trial was adequate; charge fully apprised any reasonable juror of function of aggravating and mitigating circumstances, jury's role in evaluating mitigating circumstances, and its option to recommend against death penalty.

25. **Homicide ⇐354(2), 358(1)**

Constitution permits jury in murder prosecution to impose sentence of life imprisonment, even in the face of aggravating circumstances, and requires jury to consider any evidence in mitigation. U.S.C.A. Const.Amends. 8, 14.

Millard Farmer, Joseph M. Nursey, Atlanta, Ga., for petitioner-appellant.

Paula K. Smith, Office of the Atty. Gen., Mary Beth Westmoreland, Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, Chief Judge, FAY and VANCE *, Circuit Judges.

TJOFLAT, Chief Judge:

Petitioner, Jimmie Burden, Jr., is a Georgia prisoner convicted on four counts of murder and sentenced to death on three of those counts. After exhausting his remedies in the Georgia state courts, Burden filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, alleging *inter alia* that his trial counsel had a conflict of interest. The district court denied the petition, *see Burden v. Zant*, 690 F.Supp. 1040 (M.D.Ga.1988), and Burden appealed. Because the record did not permit this court to evaluate Burden's conflict-of-interest claim, we remanded the case for an evidentiary hearing on that issue alone. *See Burden v. Zant*, 871 F.2d 956 (11th Cir.1989). The district court held the evidentiary hearing, made factual findings, and again concluded that Burden had received representation of counsel untainted by conflict of interest. After considering all of Burden's claims, we affirm the district court's denial of Burden's petition for a writ of habeas corpus.

I.

On May 29, 1980, Burden was indicted in Washington County, Georgia, on a charge of burglarizing the home of his sister, Willie Kate Dixon. Burden was arrested on the burglary indictment on August 1, 1981, in Harrington, Delaware. He waived extradition proceedings, and on August 3, 1981, he was returned to Washington County where he was incarcerated pending trial on the burglary charge. He was convicted on that charge in December 1981.

* Judge Robert S. Vance was a member of the panel that heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. *See* 28 U.S.C. § 46(d).

On September 15, 1981, while Burden was awaiting trial on the burglary charge, his nephew, Henry Lee Dixon, gave a statement to the police implicating Burden in the unsolved 1974 murders of Louise Wynn and her three children. Based upon this statement, the state secured warrants charging both Dixon and Burden with the four murders. No indictment was ever returned against Dixon, however: at Dixon's preliminary hearing, the judge ruled that, while the state had sufficient evidence to hold Dixon as a material witness against Burden, it did not have probable cause to hold him for murder; the state never renewed the murder charges. An indictment was returned against Burden on December 7, 1981, charging him with four counts of malice murder. In March 1982, a Georgia jury found him guilty on each count, and after finding that a statutory aggravating circumstance existed, recommended that he be sentenced to death for each murder.[1] On direct appeal, the Georgia Supreme Court affirmed the four murder convictions and three of the death sentences but set aside one death sentence because the conviction for which that sentence was imposed was used as an aggravating circumstance to support the other three sentences. *See Burden v. State*, 250 Ga. 313, 297 S.E.2d 242, 245 (1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1803, 76 L.Ed.2d 367 (1983).

The district court adopted the Georgia Supreme Court's summary of the facts leading to Burden's conviction, and we reproduce that summary as follows:

> On the evening of August 15 and morning of August 16, 1974, four bodies were recovered from Smith's Pond in Washington County, identified as Louise Wynn and her three children, ages 2, 3, and 4. The autopsies revealed that Louise Wynn died from multiple blows to the head; that Marvin, age 4, and James, age 2, died from drowning; and that Melinda, age 3, died from strangulation. Louise was clothed only in an undergarment and a dress torn in half. The crime scene revealed an area of disturbed pine straw, possibly evidencing a struggle. Investigators also discovered there an automobile lug wrench with what appeared to be blood stains.
>
> After extensive investigation, law enforcement officials were unable to fix upon a suspect, and the case was placed in the unsolved file some two years later. In late 1981, Henry Lee Dixon, a nephew of Burden, came forward with information leading to the arrest and indictment of this defendant.
>
> ....
>
> Henry Lee Dixon testified that on August 13, 1974, Burden came to his house and asked to ride to town with him. He then directed Dixon to a liquor store where Burden purchased a case of beer and some liquor. Burden next directed Dixon to drive to Louise Wynn's house. Burden, who had been drinking heavily all the while, went into the house, and after about 15 minutes returned with two older children, followed by Louise Wynn, who was carrying a baby. Burden told Dixon to drive, while he continued to drink, kissing and hugging Louise Wynn in the back seat. Dixon was then directed to stop along a dirt road leading to Smith's Pond, where Burden and the four victims got out of the car. Burden took from his car a shotgun, fishing poles and bait, and told Dixon to return later to pick them up. When Dixon returned he saw Burden walking down the road, he stopped and asked where the others were. Burden first said that Louise became angry and had gone to her mother's house. After Dixon wanted to go and get Louise Wynn, Burden said "he had [messed] up," that she "didn't act right" and he "hit her side the head with something" and that "she fell in the pond or he throwed her in the pond one." Dixon then asked about the children and Burden replied, "I reckon I damn well know where they are at, too." When Dixon suggested going back to the pond, Burden threatened him with a shotgun if he ever related the event to anyone.

1. Under Georgia law, the jury's sentencing recommendation is binding on the trial court, which actually sentences the defendant. *See* Ga.Code Ann. § 17-10-31 (1982).

The day after the bodies were discovered, Burden broke a pool cue over Dixon's head when he saw him talking with others, and again warned him not to mention the events of Tuesday.

Several witnesses testified that Burden and Louise Wynn were keeping social company with each other, having seen them together at various places just prior to Louise Wynn's death.

Two other witnesses testified as to physical assaults and attempted sexual assaults made upon them by Burden at times when he had been drinking. One such witness attributed to Burden the threat: "[H]e told me that he was going to throw me in a pond like he did somebody else."

Burden v. State, 297 S.E.2d at 243–44.

In his petition for a writ of habeas corpus, Burden presents the following claims for relief: (1) due to his counsel's conflict of interest, he did not receive effective assistance of counsel, as guaranteed by the sixth, eighth, and fourteenth amendments to the United States Constitution; (2) the state trial court erred in admitting evidence of unrelated bad acts in violation of rights guaranteed by the sixth, eighth, and fourteenth amendments; (3) his trial counsel's failure to provide effective assistance violated his sixth, eighth, and fourteenth amendment rights; (4) prosecutorial misconduct rendered his trial fundamentally unfair and violated his sixth, eighth, and fourteenth amendment rights; (5) the evidence was not sufficient to support the verdict, in violation of his sixth, eighth, and fourteenth amendment rights; (6) the state trial court erred in giving an inadequate jury instruction on mitigating circumstances which violated his sixth, eighth, and fourteenth amendment rights; and (7) underrepresentation of blacks and women in the grand and traverse jury pools, from which his grand jury and petit jury were drawn, violated his sixth, eighth, and fourteenth amendment rights. Because Burden's first, third, and sixth claims involve the sixth amendment right to effective assistance of counsel, we consider them together.[2] We discuss the remaining claims separately.

II. Effective Assistance of Counsel

A.

Burden contends first that he has been denied the effective assistance of counsel because his counsel labored under a conflict of interest. He bases that contention on the allegedly simultaneous representation of Burden and Henry Dixon by the public defender's office in general and by Burden's trial counsel in particular. When the case first came to this court, it became evident at oral argument that the record provided no answers to critical questions upon which the parties' arguments depended. For example, in his brief and at oral argument, Burden relied heavily on the assumption that his attorney, the public defender who was then representing both Burden and Dixon on the same murder charges, put Dixon on the stand at Dixon's committal hearing[3] and elicited testimony inculpating Burden. Burden also relied on the assumption that his attorney had negotiated and obtained transactional immunity for Dixon in exchange for Dixon's testimony against Burden. Furthermore, the practices of the two-person Public Defender's Office at the time of Burden's representation and the relationship of each attorney to Burden and to Dixon were not clear. The facts have now been sufficiently developed, both at the evidentiary hearing on remand and by supplementary filings, to permit us to resolve Burden's conflict-of-interest contention. After reviewing the elements of an ineffective-assistance-of-counsel claim based on conflict of interest, we set out those facts in some detail.

2. Burden brought the jury-composition claim for the first time in his state habeas action. Because Georgia law requires a criminal defendant to raise a challenge to jury lists at the time the jury is "put upon him," *see Young v. State*, 232 Ga. 285, 286, 206 S.E.2d 439, 442 (1974), and because Burden failed to show cause (and prejudice) so as to excuse the default, *see* Ga. Code Ann. § 9-14-42(b) (1982), the state habeas court ruled that the claim was procedurally defaulted. The court stated that Burden's allegation that his counsel was ineffective for failing to bring a jury-composition challenge was the only contention that might have satisfied the "cause" requirement and that the issue had already been decided against Burden.

Both in his petition to the district court below and in his appellate brief to this court, Burden repeated his jury-composition claim verbatim in his introductory statement of issues. He did not challenge the state court's ruling that the claim was procedurally defaulted, however, and his argument referred both the district court and this court to his ineffective-assistance-of-counsel claim for discussion of the allegedly unconstitutional jury composition.

Under federal habeas law, "[b]efore we can hear the merits of his jury composition challenge .... [Burden] must show cause for his failure to raise the challenge before the trial court and actual prejudice from that failure." *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc) (citing *Francis v. Henderson*, 425 U.S. 536, 542, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976)), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984); *see also Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). As in *Birt*, Burden "has presented only one arguably meritorious contention to satisfy the cause element of the *Francis v. Henderson* analysis: that is, that his trial counsel failed to investigate properly and timely challenge the [grand or] traverse jury composition and therefore rendered ineffective assistance of counsel." *Birt*, 725 F.2d at 597. Thus, Burden's contention that the jury pools were unconstitutionally composed collapses into his contention that his counsel rendered ineffective assistance by failing to bring a jury-composition challenge at the proper time. *See Lancaster v. Newsome*, 880 F.2d 362, 375–76 (11th Cir.1989); *Birt*, 725 F.2d at 597.

1.

[1–4] The sixth amendment right to the effective assistance of counsel entails the right to representation unimpaired by actual conflict of interest on the part of defense counsel. *See Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980); *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988). When analyzing an ineffective-assistance-of-counsel claim, we first ask whether counsel's performance, measured by professional norms prevailing at the time, was deficient and, if so, whether the deficient performance prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In evaluating such a claim based on an alleged conflict of interest, however, the inquiry is abbreviated and prejudice is presumed if—but only if—"the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067 (quoting *Cuyler*, 446 U.S. at 350, 348, 100 S.Ct. at 1719, 1718); *see Burger v. Kemp*, 483 U.S. 776, 783, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987). We note that multiple representation does not necessarily result in a constitutional violation: where the defendant has not objected to his counsel's representation of another, he must still show an actual conflict and the adverse effect of that conflict.

2.

[5] We now turn to the facts relevant to Burden's conflict-of-interest contention. Washington County is one of five counties that make up the Middle Judicial Circuit of Georgia. At the time Burden was returned to Washington County to face the burglary charge, indigent defendants in the circuit were represented by a public defender, Kenneth Kondritzer, and an assistant public defender, Michael Moses. Their representation of an indigent defendant would at times begin after a routine visit to the county jails to see if anyone there needed counsel; at other times, the judges would informally appoint the public defender's office to represent an indigent defendant at arraignment. Apparently the judges did not enter formal orders and did not designate either Kondritzer or Moses to represent particular defendants. Rather, Kondritzer and Moses divided the cases between them largely on a geographical ba-

3. Under Georgia law, an accused being held in custody prior to indictment may demand a preliminary hearing, often termed a "committal hearing," for the purpose of determining whether there exists probable cause to believe that the accused committed the charged crime and, if so, whether the accused should be detained until a grand jury considers his case. *See* Ga.Code Ann. § 17-7-23(a) (1982); *First Nat'l Bank & Trust Co. v. State*, 137 Ga.App. 760, 224 S.E.2d 866, *aff'd*, 237 Ga. 112, 227 S.E.2d 20 (1976); *see also Fleming v. Kemp*, 748 F.2d 1435, 1439 n. 14 (11th Cir.1984), *cert. denied*, 475 U.S. 1058, 106 S.Ct. 1286, 89 L.Ed.2d 593 (1986).

sis, with Kondritzer taking the majority of cases in the northern part of the circuit, where Washington County is located, and Moses taking those in the southern part. Although the two attorneys shared an office and a secretary, they handled their cases independently of one another.

Kondritzer was appointed on or about August 3, 1981, to represent Burden on the burglary charge.[4] On September 15, 1981, the criminal warrants charging Burden with the Wynn murders were issued, and Burden was indicted on those charges on December 7, 1981, one day before his conviction for burglary. The criminal warrants charging Dixon with the same murders were also issued on or about September 15, 1981, and Kondritzer undertook Dixon's representation on or about the same date. Kondritzer testified at the evidentiary hearing in the district court that he could not remember how his representation of Dixon began. There is no doubt, however, that for some period of time Kondritzer himself was representing both Burden and Dixon. Whether Burden was aware at that time that Kondritzer was representing Dixon is unclear; it is clear, however, that he did not request the trial court or Kondritzer himself to put an end to the dual representation.

A committal hearing for Dixon was held on November 19, 1981 in Washington County. The committal hearing transcript, which evidently became available after the case was argued before us but before the district court's evidentiary hearing on remand, reveals that Dixon was incarcerated at the time in a different county and that Kondritzer waived his presence. The only witness at the hearing was Chief Deputy Sheriff Mack Rogers, to whom Dixon had made the statement inculpating Burden in the Wynn murders. The judge determined that there was not probable cause to hold Dixon for murder but offered to hold him as a material witness. The State made a verbal motion to that effect, and the judge granted the motion and set bond at $50,000. Dixon did not post bond and remained in custody until the close of Burden's trial.

Had the facts been as Burden originally presented them to us, we would have had no difficulty concluding that Kondritzer's representation of Dixon had required him to sacrifice Burden, reflecting an actual conflict and adversely affecting his representation of Burden. It is now apparent, however, that this serious allegation is factually incorrect: Kondritzer, while representing Burden, did not call Dixon to the stand and elicit testimony manifestly prejudicial to Burden. Kondritzer's representation of Dixon at Dixon's committal hearing consisted of brief cross-examination that in no way damaged Burden, argument that there was no probable cause to hold Dixon, and opposition to the material witness bond set to ensure Dixon's presence—*and testimony prejudicial to Burden*—at Burden's trial. Thus, while there was a potential conflict of interest—which no doubt would have materialized had Kondritzer *continued* to represent both Burden and Dixon—all charges against Dixon were dropped, and the conflict never became actual in the sense that Kondritzer's representation of Dixon's interests required him to compromise Burden's interests. *See Stevenson v. Newsome*, 774 F.2d 1558, 1562 (11th Cir. 1985), *cert. denied*, 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986).

[6] Similarly, the assumption that Dixon received a grant of transactional immunity, negotiated by Kondritzer and the prosecutor in exchange for Dixon's testimony against Burden, is without factual support. The source of Burden's impression that Dixon was granted immunity appears to have been Dixon's testimony at Burden's trial: under cross-examination, Dixon stated that two deputy sheriffs, interrogating him on the Wynn murders, had promised that he would not be prosecuted if he testified truthfully against Burden; Dixon stated that he understood, from these promises, that he had "immunity."[5] But according to then Chief Assistant District Attorney Richard Malone, who prosecuted Burden, transactional immunity, if and when granted to a witness, was the result of a formal, signed agreement between the district attorney, the witness, and the witness's attorney. There is no documentary evidence of any sort that attests to Dixon's having received immunity, and Malone testified at the district court evidentiary hearing that he did not recall any such agreement concerning Dixon. Furthermore, Malone remembered no negotiations with Kondritzer (or any other attorney) concerning immunity for Dixon. Kondritzer testified at the district court evidentiary hearing that, after the committal hearing, he had informal discussions with Malone, which Kondritzer remembered as resulting in his "understanding" that the State was not "really interested in prosecuting Dixon" in connection with the Wynn deaths as long as Dixon testified against Burden. The impression of a witness that he would not be prosecuted as long as he testified does not establish a grant of immunity—formal or informal. And informal discussion that results in a defense attorney's understanding of the prosecution's current intentions is not negotiation of immunity. As the district court concluded, "there is [no] evidence of transactional immunity being granted to Henry Lee Dixon"; additionally, there is no evidence of any negotiations concerning immunity. Thus, Burden can no longer base his conflict-of-interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another.

[7] Burden further alleges, with respect to his conflict-of-interest claim, that his trial counsel, Moses, continued actively to represent Dixon while Dixon was being held as a material witness for the prosecution; he also argues that, even if Moses never actively represented Dixon, Kondritzer's representation of Dixon must be imputed to Moses as a member of the same public defender's office. We assume without deciding that two attorneys in the same public defender's office may be considered one attorney, *see Burger*, 483 U.S. at 783, 107 S.Ct. at 3120, and nonetheless perceive no actual conflict of interest adversely affecting Moses' performance.

The record developed at the evidentiary hearing indicates that Kondritzer, who represented Dixon while the murder charges were pending against him, resigned from the public defender's office in late December 1981, after Burden's burglary conviction and before his arraignment on the murder charges; we have already concluded that the potential conflict of interest lurking in Kondritzer's continued representation of Dixon and Burden on the same murder charges never materialized because the charges against Dixon were dropped. During the time that both attorneys were still in the public defender's office, Kondritzer and Moses did not jointly participate in either the Burden or the Dixon case. The district court found that up to the point of Kondritzer's departure "Mr. Moses had not represented petitioner as to either his burglary charge or his murder charges; neither had Mr. Moses assisted Mr. Kondritzer in any way in his representation of petitioner. Mr. Moses also had not represented nor assisted Mr. Kondritzer in representing Henry Lee Dixon." Nothing in the record causes us to question those findings.

Upon Kondritzer's departure, Moses became public defender and took over Burden's defense, a defense that required Moses to attack Dixon's testimony. The district court found that, in the course of preparing for Burden's murder trial, Moses interviewed Dixon—who was being held in county jail under the material witness bond—for the first time. Then, at trial, Moses vigorously cross-examined Dixon,

4. The trial judge prepared a post-trial report, in keeping with Georgia's Unified Appeal Procedure established to protect a defendant's rights, reduce the possibility of error, and eliminate superfluous issues in death penalty cases, *see* Ga.Code Ann. § 17-10-36. The report indicated that Kondritzer began representing Burden on the *murder* charges on August 3, 1981, the date of Burden's return to Washington County under indictment for burglary. It is apparent that the trial judge confused the two unrelated cases: Burden was not then a suspect in the Wynn cases; he was not charged with the murders until September 15, 1981 and was not indicted on the murder charges until December 7, 1981.

5. Dixon also stated that he did not really know what immunity means.

based in part on that interview. At the conclusion of Dixon's testimony, Moses opposed the prosecutor's motion that the material witness warrant against Dixon be dissolved. Moses' conduct is consistent with his recollection, expressed in testimony at the evidentiary hearing in the district court, that he did not represent Dixon in any way. In holding that Moses did not labor under an actual conflict of interest, the district court implicitly found that Moses himself did not represent Dixon before *or after* Kondritzer's departure. There is nothing in the record to suggest the contrary.

Assuming that Kondritzer's past representation of Dixon is imputed to Moses, a conflict of interest arose, for "[a]n attorney who cross-examines a former client inherently encounters divided loyalties." *Lightbourne*, 829 F.2d at 1023. Given Moses' conduct, however, even if a conflict of interest arose from his representation of a client previously represented by the same public defender's office, *see id.* at 1024, we perceive no adverse effect upon his representation of Burden. The district court found that

> Mr. Moses brought out evidence of Dixon's bad character; he inquired into the fact that Mr. Dixon had once been charged with the same crimes alleged against Mr. Burden, and [Dixon's understanding] that as a result of his testimony he was not going to be prosecuted; he cross-examined Mr. Dixon about being in custody under a material witness bond; he brought out prior inconsistent statements made by Mr. Dixon; and he generally attempted to discredit Dixon's testimony.

Like the district court, we perceive no issues that were not brought out by Moses that another attorney might have developed. Accordingly, we reject Burden's contention that Moses' presumed conflict of interest, based on Kondritzer's previous representation of Dixon, adversely affected Moses' representation of Burden.

Because Burden has demonstrated no actual conflict of interest adversely affecting counsel's performance, we hold that no such conflict deprived him of the effective assistance of counsel.

B.

Burden also contends that he did not receive effective assistance of counsel because Moses was inexperienced, overworked, did not sufficiently investigate the case, did not present mitigating evidence at sentencing, and did not challenge the composition of the grand and traverse jury pools.

[8, 9] Under the familiar two-part inquiry into ineffective-assistance-of-counsel claims, we first ask whether counsel's performance was deficient. *See Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. If so, we then determine whether the deficient performance prejudiced the defendant. *Id.*, 104 S.Ct. at 2064. The standard for measuring deficient performance is an objective one: "reasonableness under prevailing professional norms." *Id.* at 688, 104 S.Ct. at 2065. Furthermore, a reviewing court's scrutiny of counsel's performance should be highly deferential. *Id.* at 689–90, 104 S.Ct. at 2065–66 (there is "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; defendant must overcome presumption that challenged action "might be considered sound trial strategy").

[10] We note first that inexperience does not constitute ineffectiveness per se: a defendant who relies on allegations of counsel's inexperience in support of an ineffective-assistance-of-counsel claim must still make the two-part showing of deficient performance and prejudice. *See United States v. Cronic*, 466 U.S. 648, 665, 104 S.Ct. 2039, 2050, 80 L.Ed.2d 657 (1984). After reviewing Moses' performance as Burden's attorney, we conclude that his representation of Burden did not fall below the objective standard of reasonableness articulated in *Strickland*.

[11, 12] Moses testified at the state habeas court's evidentiary hearing that he had adequate time to investigate Burden's case and to prepare his defense. That Moses did not interview all of the persons now

suggested as potential witnesses does not mean that his investigation was inadequate. Moses interviewed all of the state's witnesses that he could locate, the original investigating agents of the Georgia Bureau of Investigation and of Washington County, at least one of Burden's former employers, friends of Louise Wynn, and members of Burden's family, including his mother, grandmother, sisters, and a nephew. It was evident by then—due to the eight-year time lapse, faulty memories of those interviewed, and Burden's own inability to remember his whereabouts on the day of the murders—that no alibi witnesses could be found by further investigation. In the course of his investigation, Moses visited the home of Burden's grandmother several times. Contrary to Burden's assertion, Moses' investigation provided him with considerable information about Burden's upbringing and lack of education. Moses did not fail to present such evidence at the sentencing hearing because he was unaware of it; rather, according to Moses' testimony at the district court evidentiary hearing, he made a tactical decision not to emphasize Burden's background because it was so similar to that of many persons in the area.

[13] Burden also complains that Moses failed to present sympathetic character witnesses. At the guilt phase of the trial, Moses decided to call no character witnesses for fear that the State would counter by presenting evidence of Burden's prior convictions. At the sentencing phase, he chose not to mention Burden's good behavior in prison because of the risk that introduction of prison records would do more harm than good. Although he considered calling Burden's mother and sisters to present mitigating evidence at the sentencing phase, he decided against the tactic. He specifically recalled that Burden's mother would not have made a presentable witness. Further, Burden had just been convicted of burglarizing the home of one sister. Even assuming that the family would have testified sympathetically to Burden (which is not at all certain given the burglary and a violent sexual attack upon his sister, *see infra* part III), damaging information about the burglary conviction could have been revealed to the jury through cross-examination. Surely Moses' decisions with respect to calling witnesses and presenting evidence, based as they were on information gathered through considerable investigation, are the sort of judgment calls that *Strickland* cautions us not to second-guess.

[14] Finally, Burden contends that Moses rendered ineffective assistance by failing to challenge the 1981 Washington County grand and traverse jury pools from which his grand and traverse juries were drawn. As we have previously stated, however, "[t]he sixth amendment right to effective assistance of counsel does not require counsel to raise every objection without regard to its merits." *Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir.), *cert. denied*, 469 U.S. 873, 105 S.Ct. 227, 83 L.Ed.2d 156 (1984). Moses testified at the state habeas corpus hearing that he did not consider a jury-composition challenge feasible at the time: he was familiar with the black-white ratios on the jury pools and considered them to be in line with the black-white ratio of the population at large. Malone, the prosecutor in Burden's case, confirmed this assessment, testifying that, although he had never figured exact percentages, he too remembered that the racial composition of the jury pools in 1981 generally approximated the racial composition of the population.

In support of his assertion that Moses should have challenged the composition of the jury pools, Burden presents an affidavit from Kondritzer stating that perceived discrepancies in the 1983 jury pools had prompted him to bring a challenge. Burden also attaches to his federal habeas petition a 1984 consent agreement, wherein Washington County jury commissioners agreed to revise the jury lists but did not admit discrimination, and a 1983 court order directing the county to revise its jury lists but specifically declining to find that the jury composition was discriminatory. These documents reveal that there were jury-composition disputes in 1983 and suggest, at best, that Moses might have generated a similar dispute in 1981. They do

not, however, indicate that Moses would have succeeded nor that he made an unreasonable decision when he determined that such a challenge was not feasible. A reviewing court must evaluate counsel's performance based on what counsel knew or should have known at the time rather than on hindsight, *see Strickland*, 466 U.S. at 689–90, 104 S.Ct. at 2065–66 Burden has failed to demonstrate that professional standards prevailing at the time required Moses to challenge the composition of the 1981 jury pool.[6]

In sum, after reviewing Burden's allegations of ineffective assistance of counsel, we agree with the district court that Moses' representation of Burden did not fall below an objective standard of reasonableness.

III. Admission of Extrinsic-Acts Evidence

Burden contends that the trial court erred in admitting into evidence two "bad acts," unrelated to the offenses with which he was charged. The challenged evidence is the testimony of Willie Kate Dixon (Burden's sister) and Betty Jean Darrisaw (who had dated Burden at one time). After a hearing conducted outside the presence of the jury, each witness was allowed to testify that Burden had once violently assaulted her when she refused to have intercourse with him; Burden had been drinking heavily on both occasions. Each incident occurred some six or seven years after the murder of Louise Wynn. Before allowing the testimony of each witness, the trial court instructed the jury to consider it not as direct evidence of Burden's involvement in the Wynn murders but only insofar as it might show "motive or plan or scheme or bent of mind or course of conduct." Burden argues that the incidents were too distant in time and too dissimilar in circumstance to have any relevance with respect to motive, plan, scheme, bent of mind, or course of conduct.

[15, 16] For a state court evidentiary ruling to merit federal habeas corpus relief, the ruling must have deprived the petitioner of fundamental fairness, thereby denying him due process of law. *See Williams v. Kemp*, 846 F.2d 1276, 1281 (11th Cir.1988), *cert. denied*, — U.S. —, 110 S.Ct. 1836, 108 L.Ed.2d 965 (1990); *Jameson v. Wainwright*, 719 F.2d 1125, 1126 (11th Cir.1983), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984). We note, preliminarily, that on direct appeal the Georgia Supreme Court expressly ruled that the evidence was relevant under Georgia law and was properly admitted,[7] *see Burden v. State*, 297 S.E.2d at 244, a state-law determination that this court must respect, *see Amadeo v. Kemp*, 816 F.2d 1502, 1504 (11th Cir.1987), *rev'd on other grounds sub nom. Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). Thus, Burden cannot complain that he was deprived of fundamental fairness by the trial court's erroneous application of state law.

The correctness of the ruling under Georgia law does not, of course, preclude this court from granting habeas corpus relief if the ruling was so fundamentally unfair as to deprive Burden of his federal

6. We note, furthermore, that even if we were to assume that a challenge to the composition of the traverse jury pool would have succeeded and would have made more black jurors available to serve at Burden's trial, Burden has not shown that Moses performed deficiently in deciding to proceed to trial without a challenge. Burden's brief to this court cites Moses as testifying that a jury with more black jurors would have been favorable to Burden, who is black himself. We have reviewed Moses' testimony, however, and it is obvious that Moses was making the general point that, given the jury's verdict and death sentence recommendation, *any* change in the actual jury selected could only have benefitted Burden. With respect to black jurors in particular, the prosecutor testified that at the time of the trial there was such great hostility toward Burden in the black community that he, the prosecutor, welcomed the presence of black persons on the jury.

7. After laying out the prerequisites for admitting evidence of independent crimes under state law, the Georgia Supreme Court held that, in Burden's case, "[t]he two transactions were sufficiently similar to show identity, motive, plan, scheme, bent of mind and course of conduct, and the trial court did not err in admitting testimony concerning them." *Burden v. State*, 297 S.E.2d at 244.

constitutional right to the due process of law. *See Manning v. Rose*, 507 F.2d 889, 892 (6th Cir.1974). We do not, however, consider the admission of the extrinsic-acts evidence a violation of federal due process. We have construed the due process clause as "permitting the states wide latitude in fashioning rules of evidence." *Bassett v. Smith*, 464 F.2d 347, 351 (5th Cir.1972),[8] *cert. denied*, 410 U.S. 991, 93 S.Ct. 1509, 36 L.Ed.2d 190 (1973); *see Lisenba v. California*, 314 U.S. 219, 227, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941) ("Fourteenth Amendment leaves [a state] free to adopt a rule of relevance ..."). In *Lisenba*, where the petitioner claimed that the admission of testimony concerning the drowning of his former wife denied him due process of law in his trial on charges of drowning his later wife, the Supreme Court approved specifically the admission of extrinsic-acts evidence to show motive, plan, scheme, and course of conduct. *Id.*, 62 S.Ct. at 286. Although the extrinsic incident at issue in *Lisenba* did not result in a conviction or even in criminal charges, the Court sustained the state trial court's admission of the evidence because of "the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system." *Id.*, 62 S.Ct. at 286; *see United States v. Beechum*, 582 F.2d 898, 910 (5th Cir.1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

Burden correctly asserts that a state cannot adopt a rule of evidence that permits the introduction into evidence of *any* prior act with some bearing, however tenuous, on proof of motive, plan, scheme, bent of mind, or course of conduct. *See Manning*, 507 F.2d at 894 ("To be consistent with due process, the other crime must be 'rationally connected' with the charged crime."). Burden claims that the extrinsic acts admitted into evidence at his trial were too distant in time and too dissimilar in circumstance to be rationally connected to the Wynn murders. We disagree. Under both federal and Georgia law, a long lapse of time between the extrinsic act and the charged crime does not render the former inadmissible if the acts are sufficiently similar to establish the necessary rational connection. *See United States v. Terebecki*, 692 F.2d 1345, 1349 (11th Cir.1982); *Campbell v. State*, 234 Ga. 130, 214 S.E.2d 656, 658 (1975). In this case, the two witnesses testified that (1) Burden had been drinking heavily, (2) the assaults followed their refusal to have sexual relations with him, and (3) the assaults involved attempted rape. Dixon testified that Burden had been drinking heavily on the day of the Wynn murders and that Burden, who had been kissing and hugging Louise Wynn in the car, said later that Wynn "didn't act right." Louise Wynn's body was clad only in an undergarment and a dress torn in half and was surrounded by evidence of a struggle. There is a sufficient similarity between the Willie Dixon and Darrisaw incidents and the circumstances surrounding Louise Wynn's death to establish a rational connection tending to prove motive, bent of mind, or course of conduct. We therefore hold that the admission of the extrinsic-acts evidence did not render Burden's trial fundamentally unfair and thus did not deny him the due process of law.

IV. Prosecutorial Misconduct

Burden claims that certain statements made by the prosecutor in closing argument at the sentencing phase were so improper as to deprive him of due process. He alleges specifically that (1) in alluding to the widespread publicity and community anger engendered by the Wynn murders, the prosecutor referred to matters not in evidence and improperly attempted to incite the jury; (2) the prosecutor used the race of the victim to support his plea for a death sentence; and (3) the prosecutor made an improper appeal to the patriotism and bravery of the jury.[9]

8. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

9. Burden also complains that the prosecutor misled the jury, with respect to its duty to make a separate and specific finding of a statutory aggravating circumstance, by suggesting that because it had already found Burden guilty of the

[17] In *Brooks v. Kemp*, 762 F.2d 1383, 1400 (11th Cir.1985) (en banc), *vacated*, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), *reinstated on remand*, 809 F.2d 700 (11th Cir.) (en banc) (per curiam), *cert. denied*, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987), this court articulated the standard for reviewing prosecutorial arguments made at the sentencing phase of a capital trial. *Proper* prosecutorial argument, "no matter how 'prejudicial' or 'persuasive,' can never be unconstitutional," *id.* at 1403, and even improper statements will not warrant habeas relief unless they render the sentencing proceeding fundamentally unfair, *id.* at 1400 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974)); *see Williams*, 846 F.2d at 1283 (when making fundamental unfairness determination, court "ask[s] whether there is a 'reasonable probability' that, but for the prosecutor's offending remarks, the outcome of the sentencing hearing would have been different").

In this case, we do not reach the "fundamental unfairness" inquiry, because the prosecutorial statements challenged by Burden were not improper. We consider each statement in turn.

A. *Reference to Publicity and Community Anger*

[18] Contrary to Burden's assertion, the prosecutor's reference to widespread publicity was to a matter in evidence: Washington County Sheriff J. Euree Curry had testified that the case had been highly publicized. Although there was no record evidence regarding community feeling, the reference to community anger was permissible: the jurors were members of the community and would know what the community reaction was. *See Brooks*, 762 F.2d at 1408 ("Although there was no record evidence on the crime rate, the reference was acceptable because the increase in crime is 'within the common knowledge of all reasonable people.'" (quoting *Tenorio v. United States*, 390 F.2d 96, 99 (9th Cir.) (prosecutorial reference to destruction and waste caused by heroin use acceptable as common knowledge), *cert. denied*, 393 U.S. 874, 89 S.Ct. 169, 21 L.Ed.2d 145 (1968))). Thus we hold that neither reference was improper.

B. *Reference to the Victims' Race*

[19] Burden argues that the prosecutor improperly alluded to the race of the victims to support his request for the death penalty. Burden bases his challenge on the following remarks:

> A young black lady and three black children thrown into a pond. In times past, perhaps that would not have been quite as serious to a lot of people in this county. That's regrettable to have to say. Some people wouldn't have treated that very harshly in times past, and I find that, and I'm sure you do, repugnant.

Not every allusion to the race of the victim is improper, *see Brooks*, 762 F.2d at 1409 (prosecutorial mention of facts about victim, properly developed at trial, acceptable at sentencing; victim need not remain an abstraction). Rather, we must consider the context of the prosecutor's remark. *See id.* In this case, we note first that the race of the victims was a matter of record evidence. Second, the record discloses that the prosecutor was arguing the absence of mitigating circumstances. We agree with the State's assessment of the prosecutor's statement as an appeal to the jury *not to let itself be swayed by the race of the victims* rather than as an impermissible appeal to the jury's sympathy for the victims on account of their race. We hold that the reference to the race of the victims was not improper.

C. *Appeal to the Jury's Patriotism and Bravery*

[20] The prosecutor concluded his argument by reminding the jury of the strength and courage of Americans, including those who had gone to war, in standing up to "forces of evil." He urged the jury to do the same by selecting the death penalty and sending the message that Burden's crime would not be tolerated by this society. Burden argues that this statement compares a juror's duty to select the death penalty to a soldier's duty to kill the enemy, a comparison held to be impermissible in *Brooks*. *See id.* at 1412. We cannot agree. Unlike the "war on crime" speech decried in *Brooks* (where the prosecutor implied that the jury, like a soldier under orders to kill, had no choice but to select death), the prosecutor's speech in Burden's case focused on deterrence, which is a legitimate justification for the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 184–87, 96 S.Ct. 2909, 2930–31, 49 L.Ed.2d 859 (1976); *Brooks*, 762 F.2d at 1412 ("Arguments about general or special deterrence may be considered by the jury.").

In sum, we agree with the district court that the challenged prosecutorial statements do not warrant habeas relief.

V. Insufficient Evidence

[21–23] Burden claims that there was insufficient evidence to support his conviction and that his right to due process was therefore violated. To satisfy the constitutional requirement of due process in a criminal trial, the state must prove beyond a reasonable doubt every fact that constitutes an essential element of the crime charged against the defendant. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). When considering the sufficiency of the evidence on review, the proper inquiry is not whether the reviewing court itself believes that the evidence established guilt beyond a reasonable doubt but "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original).

The elements of malice murder, with which Burden was charged, are as follows:

> (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
>
> (b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

Ga.Code Ann. § 16–5–1 (1982).

The following evidence was adduced at Burden's trial. Louise Wynn died of multiple blows to the head. Two of the children were drowned, and one died from strangulation. There was evidence of a struggle. According to the testimony of Henry Dixon, Dixon drove Burden, who had been drinking heavily, and the four victims to a pond and left them there. He returned two hours later and found Burden alone, walking away from the pond. When questioned about the others, Burden replied that he had "f—ed up," had hit Louise Wynn on the head, and that she had fallen in the pond or that he had thrown her in. Burden added that he knew where her children were as well. He warned Dixon not to mention these events, threatening Dixon first with a shotgun, then breaking a pool cue over Dixon's head several days later when he saw Dixon talking to others. Three other witnesses testified that Burden and Louise Wynn had been dating and that they had seen Louise Wynn beaten during that period. Two witnesses testified that they had been violently assaulted by Burden, who was intoxicated on each occasion, after they had refused to have sex with him; one of these witnesses also testified that Burden had threatened her and told her that he would throw her into a pond as he had thrown someone else. Reviewing this evidence in the light most favorable to the prosecution, we are satisfied that it was sufficient to permit a rational trier of fact to find beyond a reasonable doubt, with respect to each victim, all elements constituting the crime of malice murder.

four murders, it had also found the aggravating circumstance of murder committed while engaged in the commission of another capital offense. We have reviewed the prosecutor's argument and find no such improper suggestion.

VI. Improper Jury Instruction

[24] Burden claims that the jury instruction at the penalty phase of his trial failed to guide and focus the jury's consideration of mitigating circumstances, as required by the eighth and fourteenth amendments. Burden relies on *Moore v. Kemp*, 809 F.2d 702, 731 (11th Cir.) (en banc) (eighth and fourteenth amendments require trial court to instruct jury clearly and explicitly on mitigating circumstances and on jury's option to recommend against death penalty), *cert. denied*, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987), and on *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.) (en banc), *cert. denied*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986), where this court considered the adequacy of a jury instruction on mitigating circumstances. We explained in *Peek*, however, that the focus of a reviewing court's inquiry is "whether there is a reasonable possibility that the jury understood the instructions in an unconstitutional manner," *id.* at 1489 (citing *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)), and we held that an instruction on mitigation is constitutionally sufficient "if it is clear from the entire charge considered in context that a reasonable jury could not have misunderstood the nature and function of mitigating circumstances," *id.* at 1494.

[25] The Constitution permits a jury to impose a sentence of life imprisonment even in the face of aggravating circumstances, *see Gregg v. Georgia*, 428 U.S. at 197–98, 96 S.Ct. at 2936–37, and requires a jury to consider *any* evidence in mitigation, *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). After reviewing the entire charge given to the jury at the sentencing phase of Burden's trial, we are satisfied that it would fully apprise any reasonable juror of the function of aggravating and mitigating circumstances, the jury's role in evaluating mitigating circumstances, and its option to recommend against the death penalty.[10] We therefore reject Burden's contention that the instruction was constitutionally inadequate.

VII.

For the foregoing reasons, the district court's denial of the petition for a writ of habeas corpus is

AFFIRMED.

10. The trial court told the jury it was to consider each of the four murders separately, and the court read the statutory aggravating circumstance (*to wit:* defendant committed the murder while engaged in the commission of another capital felony) sought by the State in connection with each murder. The court then informed the jury as follows:

> Now, members of the jury, even if you find beyond a reasonable doubt that the State has proven the existence of the circumstance in each murder, ... you nonetheless are not required to recommend that the accused be put to death for that murder.
>
> You shall consider any mitigating circumstances. Mitigating circumstances are those circumstances which in fairness and mercy shall be considered by you in fixing punishment.
>
> You may, if you see fit, and this is a matter entirely within your discretion, provide for a life sentence for the accused in any or all murders based upon any mitigating circumstance or reason satisfactory to you, or without any reason, if you see fit to do so. You may recommend life imprisonment even though you have found the aggravating circumstance given to you in this charge for each murder to have existed beyond a reasonable doubt.
>
> The sentences to be imposed in these cases are a matter entirely within your discretion. You may provide for life sentences for this accused for any reason that is satisfactory to you or without any reason if you care to do so.... You may find the aggravating circumstance in your opinion is sufficiently substantial to call for the imposition of the death penalty and even so your verdicts may be for a life imprisonment.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Filed at 4:10 P M
SEP 20 1989
DEPUTY CLERK, U. S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

JIMMIE BURDEN,
Petitioner,

vs.

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,
Respondent.

C. A. 88-6-3-MAC (WDO)

ORDER

On April 10, 1989, the United States Court of Appeals for the Eleventh Circuit remanded this 28 U.S.C. § 2254 death penalty state habeas case "for an evidentiary hearing on petitioner's conflict of interest claim."

On June 1, 1989, an evidentiary hearing on petitioner's conflict of interest claim was held. That hearing was transcribed and the parties then submitted proposed findings of fact and conclusions of law. All having been carefully considered, this court does hereby find the facts on this issue to be as follows.

Findings of Fact

Petitioner Jimmie Burden, Jr. was arrested on August 1, 1981, in Harrington, Delaware on a May 29, 1980, indictment from the Superior Court of Washington County, Georgia. The indictment charged that on May 8, 1980, petitioner burglarized the home of his sister, Willie Kate Dixon, in Tennille, Georgia. Petitioner was also arrested on a charge of interstate flight to avoid prosecution. On August 3, 1981, petitioner was delivered to Georgia authorities and returned to Georgia. Respondent's Exhibit 1, p. 11 and Petitioner's June 30, 1989, filing, Tab 24.

At the time petitioner was returned to Washington County -- one of five counties (Candler, Emanuel, Jefferson, Toombs, and Washington) that make up the Middle Judicial Circuit -- indigent defendants were represented by a public defender, Kenneth Kondritzer, and an assistant public defender, Michael Moses, appointed pursuant to O.C.G.A. 17-12-7. Mr. Kondritzer was appointed on January 1, 1980, and Mr. Moses was appointed later that same year. The public defender's office, consisting of Mr. Kondritzer, Mr. Moses, and a secretary, was located in Louisville, Georgia. Mr. Kondritzer resided in Louisville, the northern part of the circuit, and Mr. Moses lived in Toombs County (Lyons), the southern end or part of the circuit; as a result Mr. Kondritzer and Mr. Moses "kind of divided the cases on a geographical basis." June 1, 1989, Transcript, p. 25. Mr. Kondritzer and Mr. Moses, according to now District Attorney Malone, each handled their own cases "independent of each other," and did not jointly try cases. June 1, 1989, Transcript, pp. 6, 7.

It was the responsibility of either Mr. Kondritzer or Mr. Moses to represent every indigent Middle Judicial Circuit defendant who desired counsel. While the judges, by letter, would sometimes request one of them to represent particular indigent defendants, orders appointing one of the public defenders to represent particular defendants were not entered.

Petitioner Jimmie Burden, Jr., an indigent, was represented by Public Defender Kenneth Kondritzer on the indicted charge of burglary after his return to Georgia on or about August 3. While the trial judge's report filed April 29, 1982 (Respondent's Exhibit 1, p. 47), indicates that as to the murder charges Public Defender Kondritzer began representing petitioner Burden on August 3, 1981, it is apparent that the trial judge in making that entry confused the two unrelated cases against petitioner -- burglary of his sister's home and murder of Ms. Wynn and her three children -- and in his murder case report entered the date on which Mr. Kondritzer began representing petitioner on the then only outstanding charge of burglary. Petitioner was not even charged by criminal warrants with the Wynn murders until September 15, 1981 -- six weeks later -- and not indicted for those murders until December 7, 1981 -- five months later. Public defender Kondritzer then must have begun representing petitioner on the only outstanding indictment of burglary on August 3, and sometime after warrants for murder were filed on September 15, 1981, have begun also representing petitioner on the charges of murder. The evidence does not indicate when that representation actually commenced. Since petitioner was already indicted and soon to be tried for burglary and was not even indicted for murder, Mr. Kondritzer most likely concentrated on petitioner's burglary case and waited until the murder indictment was returned on December 7, 1981, to begin work on that case.

The September 15, 1981, criminal warrants charging petitioner with the August 13, 1974, Wynn murders were based upon a statement

given to Chief Deputy Sheriff Mack Rogers by petitioner's nephew, Henry Lee Dixon. Based upon that statement, warrants also charging Henry Lee Dixon with murder were secured. Mr. Kondritzer as public defender had to represent Dixon. In doing so, Mr. Kondritzer obtained a committal hearing for Dixon which was held on November 19, 1981, in Washington County. Respondent's Exhibit A is a transcript of that hearing. Mr. Dixon was then incarcerated in Jefferson County, so Mr. Kondritzer waived his presence. The only witness was Chief Deputy Rogers who testified as to the statement given him by Henry Lee Dixon on September 15, 1981, at the Clarke County jail during an interview. The interview resulted from information received from an informant telling of Dixon having driven Jimmie Burden, Louise Wynn, and her children to a point near the pond where petitioner Jimmie Burden had allegedly killed Louise Wynn and her children. At the conclusion of Chief Deputy Rogers' testimony, the trial judge ruled that the state did not have probable cause to hold Henry Lee Dixon on a charge of murder, but did have sufficient evidence to hold him as a material witness. Bond was set at $50,000, and Henry Lee Dixon was held first until an indictment was returned against petitioner on December 7, 1981, and thereafter until petitioner was tried in March, 1982, for murder.

After the committal hearing Mr. Kondritzer had informal discussions with Chief Assistant District Attorney Malone which Mr. Kondritzer remembers resulting in "an understanding, you know, as long as he testfied, nothing would happen to him." June 1, 1989, Transcript, p. 28. Mr. Kondritzer saw Mr. Dixon

in jail and discussed his plight, and from time to time in response to his questions would tell Mr. Dixon what was going on.

According to Chief Assistant District Attorney Malone transactional immunity, if and when granted, was formally agreed to by the district attorney and all the parties. He has no recollection nor is there any other evidence of transactional immunity being granted to Henry Lee Dixon.

Mr. Dixon, during petitioner's murder trial, testified on cross-examination that he was promised immunity by Mr. Rogers and Mr. Boyd when he was interviewed in the Clarke County jail. Neither Mr. Dixon nor any other witness testified that Public Defender Kondritzer secured a promise of immunity for him.

On December 8, 1981, petitioner was tried and convicted for the May, 1980, burglary of his sister, Willie Kate Dixon's, house; he was represented by Public Defender Kondritzer. The burglary charges were totally unrelated to the murder charges; Henry Lee Dixon was not a witness in the burglary case.

On short notice, Public Defender Kondritzer resigned and left as of December 31, 1981, and Assistant Public Defender Michael Moses was appointed as public defender effective January 1, 1982. Prior thereto, Mr. Moses had not represented petitioner as to either his burglary charge or his murder charges; neither had Mr. Moses assisted Mr. Kondritzer in any way in his representation of petitioner. Mr. Moses also had not represented nor assisted Mr. Kondritzer in representing Henry Lee Dixon. June 1, 1989, Transcript, p. 55, et seq.

AO 72A
(Rev. 8/82)

As public defender, Mr. Moses inherited petitioner's murder case and in the course of preparing it for trial interviewed Henry Lee Dixon for the first time. Respondent's Exhibit 1, p. 647 and June 1, 1989, Transcript, p. 55, et seq. Based upon that interview and a transcript of the November 19, 1981, committal hearing of Henry Lee Dixon, Public Defender Moses vigorously cross-examined Henry Lee Dixon when he testified against his uncle, petitioner Jimmie Burden. Respondent's Exhibit 1, pp. 647-687. At the conclusion of Henry Lee Dixon's testimony Public Defender Moses opposed the prosecutor's motion that Mr. Dixon's material witness warrant be dissolved, and the trial court agreed that Mr. Dixon should remain in custody as a material witness until the trial was completed. Respondent's Exhibit 1, p. 688.

Conclusions of Law

Petitioner Jimmie Burden, as to the charges of murdering Louise Wynn and her children, received representation by Public Defender Michael Moses free from conflicts of interest as guaranteed to him by the Sixth Amendment. Wood v. Georgia, 450 U.S. 261, 271 (1981).

SO ORDERED, this 20th day of September, 1989.

Wilbur D. Owens, Jr.
United States District Judge

AO 72A
(Rev. 8/82)

trict of Georgia, Wilbur D. Owens, Jr., Chief Judge, No. CIV-88-6-3-MAC, denied petition, 690 F.Supp. 1040, and defendant appealed. The Court of Appeals, Vance, Circuit Judge, held that habeas petition would be remanded to district court for development of evidentiary record regarding possible conflict of interest on part of petitioner's trial counsel.

Remanded.

1. **Criminal Law** ⇐641.5

Defendant is entitled to representation that is free from conflict of interest. U.S. C.A. Const.Amend. 6.

2. **Habeas Corpus** ⇐864(7)

Habeas petition would be remanded to district court for development of evidentiary record regarding possible conflict of interest on part of petitioner's trial counsel, based on petitioner's preliminary showing that same public defender's office had represented both petitioner and state's witness in connection with same criminal offense.

Millard Farmer, Joseph M. Nursey, Atlanta, Ga., for plaintiff-appellant.

Paula K. Smith, Office of the Attorney General, Mary Beth Westmoreland, Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court For the Middle District of Georgia.

Before TJOFLAT, FAY and VANCE, Circuit Judges.

VANCE, Circuit Judge:

In December 1981 a grand jury indicted Jimmie Burden on four counts of murder for the 1974 deaths of Louise Wynn and her three children. Burden's nephew, Henry Lee "Acid" Dixon, implicated Burden in the murders after Dixon was arrested for the crimes following a seven year investigation. A jury found Burden guilty of all four murders and he was sentenced to death on each count. The Georgia Supreme Court affirmed the four convictions and three of the death sentences; the

Jimmie BURDEN, Jr., Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

No. 88-8619.

United States Court of Appeals, Eleventh Circuit.

April 10, 1989.

Defendant who had been convicted of murder by Georgia state court petitioned for federal habeas relief. The United States District Court for the Middle Dis-

fourth was vacated and remanded for resentencing to life imprisonment. *Burden v. State*, 297 S.E.2d 242 (1982). The United States Supreme Court denied certiorari. *Burden v. Georgia*, 460 U.S. 1103, 103 S.Ct. 1803, 76 L.Ed.2d 367 (1983). After exhausting his state remedies, Burden filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court denied the petition, 690 F.Supp. 1040, and this appeal follows.

[1, 2] One of the most serious issues Burden raises in his appeal is whether his trial counsel labored under a conflict of interest. A criminal defendant is entitled under the sixth amendment to representation that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). Because the record is inadequate to support resolution of this issue, we remand for an evidentiary hearing on petitioner's conflict of interest claim and express no opinion as to the other issues raised in his appeal.

The record reflects that the Public Defender's Office of Georgia's Middle Judicial Circuit was appointed to represent Dixon after his arrest in August 1981. Dixon, testifying at his commitment hearing under a grant of immunity, inculpated petitioner in the crimes for which Dixon was charged. The trial court did not find probable cause to bind Dixon over to the grand jury but ordered him to remain in custody as a material witness. After petitioner's arrest, the trial court appointed the same Public Defender's Office to represent petitioner. The Public Defender's Office at that time consisted solely of Kenneth Kondritzer, the Public Defender, and Mickey Moses, the Assistant Public Defender. In February 1982, before petitioner's trial, Kondritzer resigned and Moses became Public Defender. In an affidavit, Kondritzer states that he "continued to represent Henry Dixon until [he] left the Public Defenders' [sic] Office" despite the fact that the charges against Dixon had been dropped. Moses represented petitioner at trial.

The record leaves several important questions unanswered. It does not contain orders appointing either Kondritzer or Moses personally to represent Dixon and Burden; nor does it indicate which public defender, if either, negotiated Dixon's immunity agreement. It reveals little about the practices of the Public Defender's Office at the time Kondritzer was Public Defender and, specifically, nothing about Moses' relationship to individual cases in the office. Finally, it contains little information about the nature of Kondritzer's "continued representation" of Dixon after the trial judge declined to bind him over to the grand jury.

A comprehensive history of both Dixon's and Burden's representation is necessary for us to evaluate petitioner's conflict of interest claim. Accordingly, we retain jurisdiction of the case and remand it to the district court for an evidentiary hearing limited to the conflict of interest issue. The district court is requested to certify its findings and the record of its proceedings to us within ninety days of the issuance of this opinion. *See Walker v. Davis*, 840 F.2d 834, 839–40 (11th Cir.1988); *Green v. Zant*, 715 F.2d 551, 554 (11th Cir.1983).

REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH INSTRUCTIONS.

Jimmie BURDEN, Jr., Petitioner,

v.

Walter ZANT, Warden, Respondent.

Civ. A. No. 88-6-3-MAC (WDO).

United States District Court,
M.D. Georgia,
Macon Division.

July 12, 1988.

Petitioner sought habeas corpus relief from murder convictions. The District Court, Owens, Chief Judge, held that: (1) public defender's representation of material witness after charges against witness had been dropped and after witness' attorney had resigned as public defender and had turned file over to defender was not ineffective assistance; (2) admission of bad acts evidence against petitioner did not deprive him of due process; and (3) evidence supported convictions and death sentence.

Petition denied.

1. Criminal Law ⇐641.13(1)

Claims of ineffective assistance must be reviewed from perspective of counsel and must take into account all circumstances of case as they are known to counsel at time in question and as they are reflected in record. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(1)

Counsel owes criminal client duty to be loyal, to avoid conflicts of interest, to consult with client on important decisions, to keep client informed of important developments, and to bring to bear skill and knowledge rendering trial reliable, adversarial process. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.5

Client seeking to establish ineffective assistance arising out of conflict of interest must demonstrate actual conflict of interest and adverse affect on adequacy of representation. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.5(6)

Public defender's representation of material witness against client after charges against witness had been dropped and after witness' attorney had resigned as public defender and transferred file was not actual conflict of interest, did not adversely affect defendant's representation of client, and was not ineffective assistance; public defender never reviewed witness' file and had no need to do so; confidences gained by attorney during representation of witness were not divulged to defender; and defender acted as any other attorney in impeaching and cross-examining witness. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(2)

Client failed to establish that challenge to racial composition of grand and traverse juries would have been meritorious and that attorney rendered ineffective assistance by failing to challenge juries. U.S.C.A. Const.Amend. 6.

6. Constitutional Law ⇐268(10)
Criminal Law ⇐369.2(1)

Admission of bad acts evidence that state court found relevant as matter of Georgia law did not deprive petitioner of fundamental fairness and did not violate due process. U.S.C.A. Const.Amends. 5, 14.

7. Constitutional Law ⇐268(10)

Overwhelming evidence of guilt defeated argument that bad acts evidence constituted crucial, critical, and highly significant factor in prosecution against petitioner and defeated claim that admission of evidence violated due process, even if evidence was inadmissible under Georgia law. U.S.C.A. Const.Amends. 5, 14.

8. Constitutional Law ⇐270(1)

Petitioner did not have due process right to have jury decide on concurrent or consecutive life sentences after Georgia Supreme Court had overruled decisions giving jury that power. U.S.C.A. Const.Amends. 5, 14.

9. Homicide ⇐250

Evidence supported state conviction of habeas corpus petitioner for murder of mother and her children; driver testified that he had dropped petitioner and victims off at road leading to pond and picked up petitioner after returning; and victims' bodies were recovered from pond. 28 U.S.C.A. § 2254.

10. Homicide ⇐354

Gruesome murder of child victims' mother by multiple blows to head, and gruesome murders of young children by drowning or strangulation supported death sentence of habeas corpus petitioner. 28 U.S.C.A. § 2254.

Millard Farmer, Atlanta, Ga., for petitioner.

Paula K. Smith, Atlanta, Ga., for respondent.

OWENS, Chief Judge:

On January 15, 1988, petitioner Jimmie Burden, Jr. filed this 28 U.S.C. § 2254 habeas petition attacking his convictions in the Superior Court of Washington County, Georgia, on four counts of murder, and also attacking the three death sentences and one life sentence that he received for committing these offenses. Petitioner was represented by able counsel, Joseph M. Nursey, Esq. and Millard C. Farmer, Esq. Because of this representation, the court's

normal practice of appointing counsel was not necessary. The parties have thoroughly briefed the questions involved in petitioner's case, and after reviewing the entire record, the court is now prepared to render a decision on Mr. Burden's petition.

I. Procedural History

Upon a trial by jury that commenced on March 1, 1982, petitioner was found guilty on all four counts of murder. The jury found the existence of four statutory aggravating circumstances and sentenced petitioner to four death sentences pursuant to O.C.G.A. § 17-10-30(b)(2). On direct appeal, the Supreme Court of Georgia affirmed the four murder convictions, affirmed three of the four death sentences, but with respect to the death sentence imposed for the murder of Louise Wynn, found that her murder was "mutually supporting" the imposition of the death sentence for the other three murders, and, therefore, only a life sentence was appropriate on this count. *See Burden v. State*, 250 Ga. 313, 297 S.E.2d 242 (1982). The Supreme Court of the United States refused to grant certiorari to review this decision of the Georgia Supreme Court.

Petitioner filed his first petition for writ of habeas corpus on July 13, 1983, in the Superior Court of Butts County. An evidentiary hearing was held on October 24, 1983, at which time petitioner was afforded an opportunity to present evidence to support his petition. Millard L. Farmer, Esq., Joseph M. Nursey, Esq. and Kenneth Rose, Esq. assisted petitioner in presenting his case. Following this hearing a second evidentiary hearing was set for March, 1984. Before that hearing could be held, however, petitioner notified the state court, in a letter dated March 1, 1984, that he had no additional evidence, other than an additional affidavit, to present to the court. The matter was thereafter briefed by the parties, and the Superior Court of Butts County denied relief in an order dated September 5, 1984. This order was subsequently amended on September 20, 1984, to find that petitioner had procedurally defaulted under Georgia law in bringing his jury composition claim. On March 5, 1985, the Supreme Court of Georgia denied an application for a certificate of probable cause to appeal, and the Supreme Court of the United States again denied certiorari.

Petitioner then filed a second petition for writ of habeas corpus in the Butts County Superior Court, in which he raised a single claim, namely, that Georgia's death penalty statute was discriminatorily applied against black people and persons accused of killing white people. The state habeas court found this claim to be successive, and dismissed the petition. The Supreme Court of Georgia denied an application for a certificate of probable cause to appeal on March 11, 1987. Finally, petitioner has filed the instant petition asserting claims previously raised in both his direct appeal and in his first state habeas petition. Having exhausted his state remedies, these claims are ripe for review.

II. The Evidence

The court has read the entire trial transcript, the transcripts of the hearings held in the state court system, the briefs of the parties filed in both the state courts and in this court, and the various orders entered by the state courts affirming petitioner's convictions. After reviewing this information the court finds that the Georgia Supreme Court's description of the evidence against Mr. Burden in *Burden v. State*, 250 Ga. 313, 297 S.E.2d 242 (1982), accurately reflects what the evidence, viewed in the light most favorable to the prosecution, showed. It is, therefore, set out here as the court's *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), finding:

> On the evening of August 15 and morning of August 16, 1974, four bodies were recovered from Smith's Pond in Washington County, identified as Louise Wynn and her three children, ages 2, 3 and 4. The autopsies revealed that Louise Wynn died from multiple blows to the head; that Marvin, age 4, and James, age 2, died from drowning; and that Melinda, age 3, died from strangulation. Louise was clothed only in an undergarment and a dress torn in half. The crime scene revealed an area of disturbed pine straw, possibly evidencing a struggle. Investigators also discovered there an automobile lug wrench with what appeared to be bloodstains.
>
> After extensive investigation, law enforcement officials were unable to fix upon a suspect, and the case was placed in the unsolved file some two years later. In late 1981, Henry Lee Dixon, a nephew of Burden, came forward with information leading to the arrest and indictment of this defendant.
>
> Henry Lee Dixon testified that on August 13, 1974, Burden came to his house and asked to ride to town with him. He then directed Dixon to a liquor store where Burden purchased a case of beer and some liquor. Burden next directed Dixon to drive to Louise Wynn's house. Burden, who had been drinking heavily all the while, went into the house, and after about 15 minutes returned with two older children, followed by Louise Wynn, who was carrying a baby. Burden told Dixon to drive, while he continued to drink, kissing and hugging Louise Wynn in the back seat. Dixon was then directed to stop along a dirt road leading to Smith's Pond, where Burden and the four victims got out of the car. Burden took from his car a shotgun, fishing poles and bait, and told Dixon to return later to pick them up. When Dixon returned he saw Burden walking down the road, he stopped and asked where the others were. Burden first said that Louise became angry and had gone to her mother's house. After Dixon wanted to go and get Louise Wynn, Burden said "he had [messed] up," that she "didn't act right" and he "hit her side the head with something" and that "she fell in the pond or he throwed her in the pond one." Dixon then asked about the children, and Burden replied, "I reckon I damn well know where they are at, too." When Dixon suggested going back to the pond, Burden threatened him with a shotgun if he ever related the event to anyone.
>
> The day after the bodies were discovered, Burden broke a pool cue over Dixon's head when he saw him talking with others, and again warned him not to mention the events of Tuesday.
>
> Several witnesses testified that Burden and Louise Wynn were keeping social company with each other, having seen them together at various places just prior to Louise Wynn's death.
>
> Two other witnesses testified as to physical assaults and attempted sexual assaults made upon them by Burden at times when he had been drinking. One such witness attributed to Burden the threat: "[H]e told me that he was going to throw me in a pond like he did somebody else."

See Burden, 250 Ga. 313-14, 297 S.E.2d 243-44.

III. Allegations of Error

Petitioner Burden has presented eight grounds for habeas relief. His eight allegations of error are: (1) that Mr. Burden's trial counsel maintained an actual conflict of interest in his representation of Mr. Burden; (2) that Mr. Burden was denied effective assistance of counsel; (3) that the grand and traverse jury pools from which a jury was drawn in Mr. Burden's case was unconstitutionally composed; (4) that the trial court unconstitutionally admitted evidence of wholly unrelated "bad acts" allegedly committed by the petitioner; (5) that the trial judge improperly deprived the jury of its authority to sentence Jimmie Burden to either concurrent or consecutive life sentences; (6) that prosecutorial misconduct rendered Jimmie Burden's sentences of death fundamentally unfair; (7) that there was insufficient evidence to support the guilty verdict; and (8) that the jury instructions at the penalty phase of Jimmie Burden's trial failed to adequately guide and focus the jury's consideration of mitigating circumstances. The first three of these allegations of error constitute a claim under the Sixth Amendment for effective assistance of counsel and will be dealt with together. The remaining allegations of error will thereafter be discussed separately.

A. Whether petitioner received effective assistance of counsel

[1, 2] In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984), the Supreme Court determined that the standard to be applied in determining whether a petitioner has received effective assistance of counsel is whether the attorney's performance was deficient *and* whether that deficient performance prejudiced the defense. *See Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir.1986), *cert. denied* — U.S. —, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987). Claims of ineffective assistance of counsel must be reviewed from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question. *Id.* at 936 (quoting *Washington v. Watkins*, 655 F.2d 1346, 1356 (5th Cir.1981) (Unit A), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982)). This standard requires that the circumstances as known to petitioner's attorney at the time of the trial be reflected in the record. With respect to counsel's duty to avoid conflicts of interest, representation of the criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333 (1980). From counsel's function as assistant to the defendant derive the over arching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

[3] Conflicts of interest necessarily implicate a breach of counsel's duty of loyalty which is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067. To establish a Sixth Amendment violation, petitioner Burden must demonstrate that both an actual conflict of interest existed and that such conflict adversely affected the adequacy of Mr. Moses' representation. *Id. See also Smith v. White*, 815 F.2d 1401, 1404 (11th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 181, 98 L.Ed.2d 133 (1987); *Porter v. Wainwright*, 805 F.2d 930, 939–40 (11th Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987); and *Stevenson v. Newsome*, 774 F.2d 1558, 1562 (11th Cir.1985), *cert. denied*, 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986).

The first question the court must answer then is whether or not Mr. Burden has demonstrated an actual conflict of interest. "A mere possibility of conflict of interest does not rise to a level of a Sixth Amendment violation." (citations omitted). *Smith v. White*, 815 F.2d at 1404. In *Stevenson v. Newsome*, the court of appeals quoted from *Barham v. United States*, 724 F.2d 1529, 1535 (11th Cir.1984), which stated:

> If a defense owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. Interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

[4] In this case petitioner has demonstrated that the Washington County Public Defender's Office was initially brought in to represent Mr. Dixon after he and Mr. Burden were charged with the murders of Ms. Wynne and her three children. At the time of their arrest, the Public Defender's Office of the Middle Judicial Circuit consisted of two attorneys, Mr. Ken Kondritzer and Mr. Mickey Moses. Mr. Kondritzer represented Mr. Dixon at the committal hearing held in his case. The result of this hearing was that the state court found insufficient evidence to bind Mr. Dixon over on the murder charges, but held him in jail under a material witness bond. It was shortly after this committal hearing that Mr. Kondritzer resigned as Public Defender for the circuit and Mr. Moses was appointed to replace him. Mr. Moses was, thus, given all of Mr. Kondritzer's files, which included Mr. Dixon's case. No charges were pending against Mr. Dixon at the time Mr. Moses was given Mr. Dixon's file. Acting in his role as chief public defender, Mr. Moses went on to defend Mr. Burden at trial.

Looking at the evidence presented by petitioner in the state habeas hearing, the court finds that he has failed to demonstrate either an actual conflict of interest or that this alleged conflict adversely affected the adequacy of Mr. Moses' representation of Mr. Burden. When Mr. Moses was appointed to take Mr. Kondritzer's place as chief public defender, he acceded to all of the files in the public defender's office, both pending and closed. Of course, Mr. Dixon had previously been represented by the public defender's office in Washington County, but at the time Mr. Moses took possession of Mr. Dixon's file, the charges against Mr. Dixon had already been dropped by court action. Petitioner has presented no evidence to show that Mr. Moses reviewed Mr. Dixon's file, nor was there any testimony to the effect that certain confidences gained by Mr. Kondritzer during his representation of Mr. Dixon had been, in any, way, divulged to Mr. Moses. Finally, Mr. Moses was under no obligation to take any action to represent Mr. Dixon in his status as a material witness that could be viewed as detrimental to his representation of Mr. Burden. In fact, at the time of Mr. Burden's trial, the charges against Mr. Dixon had already been dropped; Mr. Dixon, through no help of Mr. Moses, had been granted immunity from prosecution; and the decision to hold Mr. Dixon under a material witness bond had already been rendered. Mr. Moses, therefore, could take no action to harm Mr. Dixon, and was thus left unbridled in his defense of Mr. Burden. The court is simply not prepared to find that a public defender's office is absolutely barred from defending any criminal defendant in a criminal trial wherein a potentially adverse witness who has been represented earlier by some attorney in that office may be called to testify. Petitioner must set out additional conflict evidence before he would be entitled to succeed on this type of Sixth Amendment claim. Accordingly, because petitioner has failed to present evidence of an actual conflict, the court finds that there was no actual conflict to render Mr. Moses' performance ineffective.

Even if Mr. Moses was acting under a conflict of interest at the time of his representation of Mr. Burden, petitioner has failed to show that Mr. Moses failed to do something that an attorney not acting under a conflict would otherwise have done. Mr. Moses brought out evidence of Mr. Dixon's bad character; he inquired into the fact that Mr. Dixon had once been charged with the same crimes alleged against Mr. Burden, and that as a result of his testimony he was not going to be prosecuted; he cross-examined Mr. Dixon about being in custody under a material witness bond; he brought out prior inconsistent statements made by Mr. Dixon; and he generally attempted to discredit Mr. Dixon's testimony. The court perceives of no issues that were not brought out by Mr. Moses that another attorney might have developed. Absent some evidence of actual prejudice, this court cannot find ineffective assistance of counsel. *Smith*, 815 F.2d at 1404.

[5] The second allegation of ineffective assistance derives from Mr. Moses' failure to challenge the Washington County grand and traverse juries used to indict Mr. Burden. At the state evidentiary hearing, petitioner's only evidence of discrimination in the selection of the juries used in Washington County was an affidavit signed by Mr. Kondritzer stating that he found substantial discrepancies in the jury pools being utilized by Washington County during this time period. *See* Affidavit of Kenneth Kondritzer dated February 29, 1984. Mr. Moses and Mr. Malone, the District Attorney for the Middle Judicial Circuit of Georgia, on the other hand, testified that they were unaware of any particular problems with the jury pools used in Mr. Burden's case, that they generally kept abreast of the racial percentages being selected for jury duty, and that the percentages being chosen appeared generally to be in line with the relevant population statistics. No additional evidence was proffered to this court beyond the evidence presented in the state court.

Before this court can find ineffective assistance in not bringing a jury challenge claim, the court must first find that such a challenge would have been successful. Mr. Farmer and Mr. Nursey have had significant experience in bringing jury challenges, yet they have made no independent effort in getting relevant statistical data beyond the conclusory affidavit of Mr. Kondritzer. While the court recognizes that the state refused to provide petitioner with unlimited funds to pursue his jury challenge claim, the court believes that there were alternative methods available to petitioner and his counsel that would have allowed him to develop facts necessary to support a jury challenge claim. The burden being on the petitioner to prove discrimination in the selection of the grand and traverse juries, the court is unwilling to presume discrimination in order to decide whether failure to bring such a claim was ineffective. Accordingly, the court refuses to find that by not bringing a jury challenge claim, Mr. Moses' representation was ineffective. Petitioner having failed to show that a jury challenge claim would have been meritorious, petitioner simply has not met his burden in making out such a claim.

Finally, the court has reviewed Mr. Moses' overall performance in Mr. Burden's trial and in the direct appeals taken by him, and finds that Mr. Moses' performance was more than adequate to satisfy the Sixth Amendment's requirement of effective assistance of counsel. Petitioner has not shown any facts to support his claim that Mr. Moses' representation fell below an objective standard of reasonableness, nor has he shown any prejudice resulting to his defense as a result of this representation. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Because he has utterly failed in proving these elements, petitioner's claim of ineffective assistance of counsel is totally without merit, and, therefore, must be denied.

B. Evidence of Bad Acts

Petitioner also contends that the trial court's introduction into evidence of certain bad acts allegedly committed by him was impermissibly prejudicial and denied him due process of law. In order to find a violation of petitioner's due process rights, evidentiary errors must be "of such magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause." *See Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.), *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976); and *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir.1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). The district court must decide whether the evidence is "material in the sense of a crucial, critical highly significant factor." *See Hills*, 529 F.2d at 401; and *Osborne v. Wainwright*, 720 F.2d 1237, 1238–39 (11th Cir.1983). Overwhelming evidence of guilt defeats the argument that such evidence constitutes a "crucial, critical, highly significant factor," and if overwhelming evidence of guilt is shown, any constitutional error would simply be harmless. *See Rose v. Clark*, 478 U.S. 570, 576–79, 106 S.Ct. 3101, 3105–07, 92 L.Ed.2d 460, 469–71 (1986).

[6, 7] The state court has found that the introduction of the "bad acts" evidence was relevant as a matter of Georgia law, and this court cannot say that its admission denied Mr. Burden fundamental fairness under these circumstances. *See Jameson v. Wainwright*, 719 F.2d 1125, 1127 (11th Cir.1983), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984). Further, even if this evidence was admitted in violation of Georgia law, there was still no violation of due process. The overwhelming weight of the evidence of Mr. Burden's guilt defeats his argument that evidence of the assaults committed by him at a later date constituted a "crucial, critical, highly significant factor" in the case against him. Accordingly, because this court must view the evidence in the light most favorable to the prosecution, and because the evidence against Mr. Burden viewed in this light is overwhelmingly against him, the court must conclude that the introduction of these bad acts did not deprive petitioner of his right to due process of law.

C. The trial judge's statement regarding concurrent or consecutive life sentences to the jury

[8] At the penalty phase of Jimmie Burden's trial, the trial judge instructed the jury that it had no say as to whether any life sentences imposed would run concurrently or consecutively. Petitioner contends that it was within the discretion of the jury to decide the question of whether Mr. Burden should be given concurrent or consecutive life sentences. He also cites certain Georgia law which states that a jury is authorized to decide whether the life sentences it imposes should run concurrently or consecutively. *See Anglin v. State*, 244 Ga. 1, 257 S.E.2d 513 (1979). The state has shown, though, that the Georgia Supreme Court's decisions supporting petitioner's contentions were based upon an erroneous application of the law, and that these cases were subsequently overruled in 1985. *See Welch v. State*, 254 Ga. 603, 331 S.E.2d 573 (1985). Petitioner contends that despite this subsequent action by the Georgia Supreme Court, the law in 1981 was that a jury could require either consecutive or concurrent life sentences to be served if mercy was recommended. In this court's opinion, however, the fact that the law was being applied improperly before 1985 should not give petitioner a due process claim to have it so applied in his case. Habeas relief on this ground, therefore, must be denied.

D. Prosecutorial misconduct

Petitioner argues that certain statements made in the sentencing phase of Jimmie Burden's trial were so egregious that it rendered the death sentences in his case fundamentally unfair. After reviewing the statements in question, the court finds that the remarks made were not sufficiently improper to warrant habeas relief. Taken as a whole they were not so egregious as to render the death sentences fundamentally unfair, thus, in violation of his right to due process. Petitioner's cited case of *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), *cert. denied*, — U.S. —, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1986), does not require reversal of petitioner's convictions.

E. Insufficient evidence to support the guilty verdict

[9, 10] Viewing the evidence in the light most favorable to the prosecution, the court is persuaded that there was ample evidence to convict petitioner of the four murders involved in this case. Furthermore, the gruesome manner in which the victims were killed supports the sentences of death that he was given by the jury that found him guilty of committing those crimes. Accordingly, this allegation of error is also meritless.

F. The jury instructions—explanation of mitigating circumstances

After reviewing the instructions given on the issue of mitigation and considering the argument of the attorneys in this case, the court finds that there is no merit to petitioner's contentions that the instructions given in his trial were inadequate under the standards set out in *Peek v. Kemp*, 784 F.2d 1479, 1494 (11th Cir.1986), and *Spivey v. Zant*, 661 F.2d 464 (5th Cir.1981) (Unit B), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982). Finding no error, habeas relief must be denied on this final ground.

In conclusion, upon overwhelming evidence of guilt, this court finds that petitioner has been constitutionally convicted with effective assistance of counsel for the four murders he was charged with, and further finds that he was constitutionally sentenced to three death sentences and one life sentence for committing these offenses. His petition for writ of habeas corpus having been found meritless in all respects, is, therefore, DENIED in its entirety.

The Supreme Court of South Carolina

Earl S. Hunter, Petitioner,

v.

State of South Carolina, Respondent.

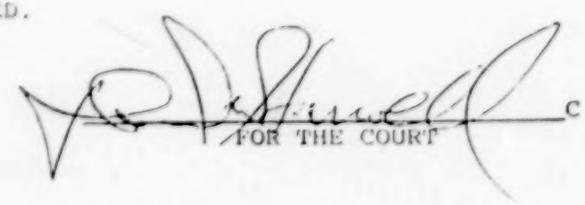
O R D E R

Counsel has submitted a petition pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), and moves to be relieved. We deny the petition to be relieved and direct the parties to serve and file a petition and return addressing the following issues:

> (1) Does a change in the law constitute sufficient reason under S.C. Code Ann. §17-27-90 (1988) to file a successive PCR application?, and
>
> (2) Does Brown v. State, ___ S.C. ___, 412 S.E.2d 399 (1991), entitle a petitioner to relief when the guilty plea judge gives erroneous parole eligibility advice at the plea hearing even though there is evidence that counsel rendered effective assistance? See Richardson v. State, Opinion No. 23785 (S.C.Sup.Ct. filed February 1, 1993)(Davis Adv.Sh.No. 3 at 20).

Petitioner shall serve and file the petition within twenty (20) days of the date of this order. Thereafter, respondent shall have thirty (30) days to serve and file its return.

IT IS SO ORDERED.



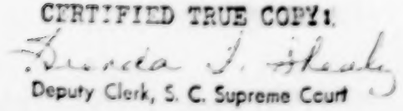
C.J.

FOR THE COURT

Columbia, South Carolina

March 11, 1993

CERTIFIED TRUE COPY:



Deputy Clerk, S. C. Supreme Court

ISSUE PRESENTED

The post-conviction relief judge erred in ruling that the petition for writ of habeas corpus was successive to the earlier post-conviction relief application where Brown v. State had been decided in the interim.

STATEMENT

Earl S. Hunter appeared before Judge Marion H. Kinon in Aiken County on November 6, 1986, and pleaded guilty to armed robbery and two counts of assault with intent to kill. Judge Kinon explained to petitioner that he could be sentenced to imprisonment for ten years on each of the assault charges; as to armed robbery, he said, "[Y]ou could receive a minimum sentence of ten years, a maximum sentence of twenty-five years, and [you] will not be eligible for parole until you have served at least seven years." App. p. 3, line 15 - p. 4, line 24. Petitioner then entered his pleas and Judge Kinon sentenced him to consecutive sentences of twenty-one years for armed robbery and seven years on each count of assault with intent to kill.

Petitioner filed an application for post-conviction relief dated October 30, 1987. Judge Luke N. Brown, Jr. presided at an evidentiary hearing on June 3, 1988. Petitioner testified that defense counsel had not explained to him that he would be ineligible for parole under S.C. Code §24-21-220 because he had a prior conviction for armed robbery in 1975 and that he would not have pleaded guilty had he known this. App. p. 77, lines 1-19. Defense counsel testified, "I don't know if I did or not. I really don't remember." App. p. 99, lines 11-17. Judge Brown denied relief in an order dated June 30, 1988.

Hunter filed a petition for writ of habeas corpus in the United States District Court on August 28, 1989. In it he alleged, "At no time did the sentencing judge or defense counsel advise me

that I would be eligible for parole the entire term of my sentence. Had I known of this special and direct consequence, I would have plead (sic) not guilty and insisted on going to trial." App. p. 141. District Judge Matthew J. Perry denied relief in an order dated April 13, 1990.

Finally, Hunter filed a petition for writ of habeas corpus dated March 26, 1992, in Aiken County. In it he argued, "After petitioner had sought and been denied relief in all of the previous state and federal courts, the South Carolina Supreme Court held in Brown v. State, ___ S.C. ___, 412 S.E.2d 399 (1991), that a guilty plea is not made knowingly and voluntarily where a trial judge misinforms a defendant that he will be eligible for parole, when in fact the defendant will not be eligible for parole, and accepts his guilty plea." App. p. 164 and 165. Judge Rodney A. Peeples denied relief in an order dated May 31, 1992, ruling that the petition was successive to the prior post-conviction relief proceeding. This petition followed.

ARGUMENT

The post-conviction relief judge erred in ruling that the petition for writ of habeas corpus was successive to the earlier post-conviction relief application where Brown v. State, had been decided in the interim.

An applicant may file a second post-conviction relief application under S.C. Code §17-27-90 if he can show a "sufficient reason" why a ground was not asserted or was "inadequately raised" in his original application. In Brown v. State, ___ S.C. ___, 412 S.E.2d 399, 401 (1991), citing North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970), the Court held that "when a trial judge misinforms a defendant that he is eligible for parole when in fact he is ineligible for parole, his plea does not represent 'a voluntary and intelligent choice among alternative courses of action' available to him." Brown was decided after petitioner's legitimate claim was initially rejected in state and federal court. S.C. Code §17-27-90 was designed to promote finality in criminal convictions and prevent "sand-bagging" of issues. Here, petitioner has raised the "Brown issue" every step of the way.

As noted, §17-27-90 provides that a successive post-conviction relief application may be filed where for "sufficient reason" it was "inadequately raised" in the original application. The circumstances of this case are that petitioner could not have adequately raised the judge's failure to inform him of his ineligibility for parole since Brown was decided after the initial application. For this reason, the case should be remanded to the

lower court for an evidentiary hearing or petitioner's guilty pleas should be vacated.

92-8836

No. ____ ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

Supreme Court, U.S.
FILED
APR 15 1993
OFFICE OF THE CLERK

JIMMIE BURDEN, Jr.,

Petitioner,

v.

WALTER ZANT, Warden, Georgia
Diagnostic & Classification Center,

Respondent.

CERTIFICATE OF SERVICE BY MAIL

I do hereby certify that I have served upon the attorney for the Respondent the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in this action by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Paula K. Smith
Assistant Attorney General
State of Georgia
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This the 15th day of April, 1993, in Columbia, South Carolina.

John H. Blume

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-8619

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 19 1993
MIGUEL J. CORTEZ
CLERK

JIMMIE BURDEN, JR.,

Petitioner-Appellant,

versus

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

On Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

(✓) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

ORIGINAL

Supreme Court, U.S.
FILED
1993
OFFICE OF THE CLERK

No. 92-8836

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

JIMMIE BURDEN, Jr.,

Petitioner,

v.

WALTER ZANT, Warden, Georgia
Diagnostic & Classification Center,

Respondent.

CERTIFICATE OF SERVICE BY MAIL

I do hereby certify that I have served upon the attorney for the Respondent the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in this action by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Paula K. Smith
Assistant Attorney General
State of Georgia
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This the 15th day of April, 1993, in Columbia, South Carolina.

John H. Blume